TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 307.

A. N. KING, P. J. MANN, A. S. NICHOLS, THE MULTNOMAH INVESTMENT COMPANY, AND FRED. N. PENDLETON, PLAINTIFFS IN ERROR,

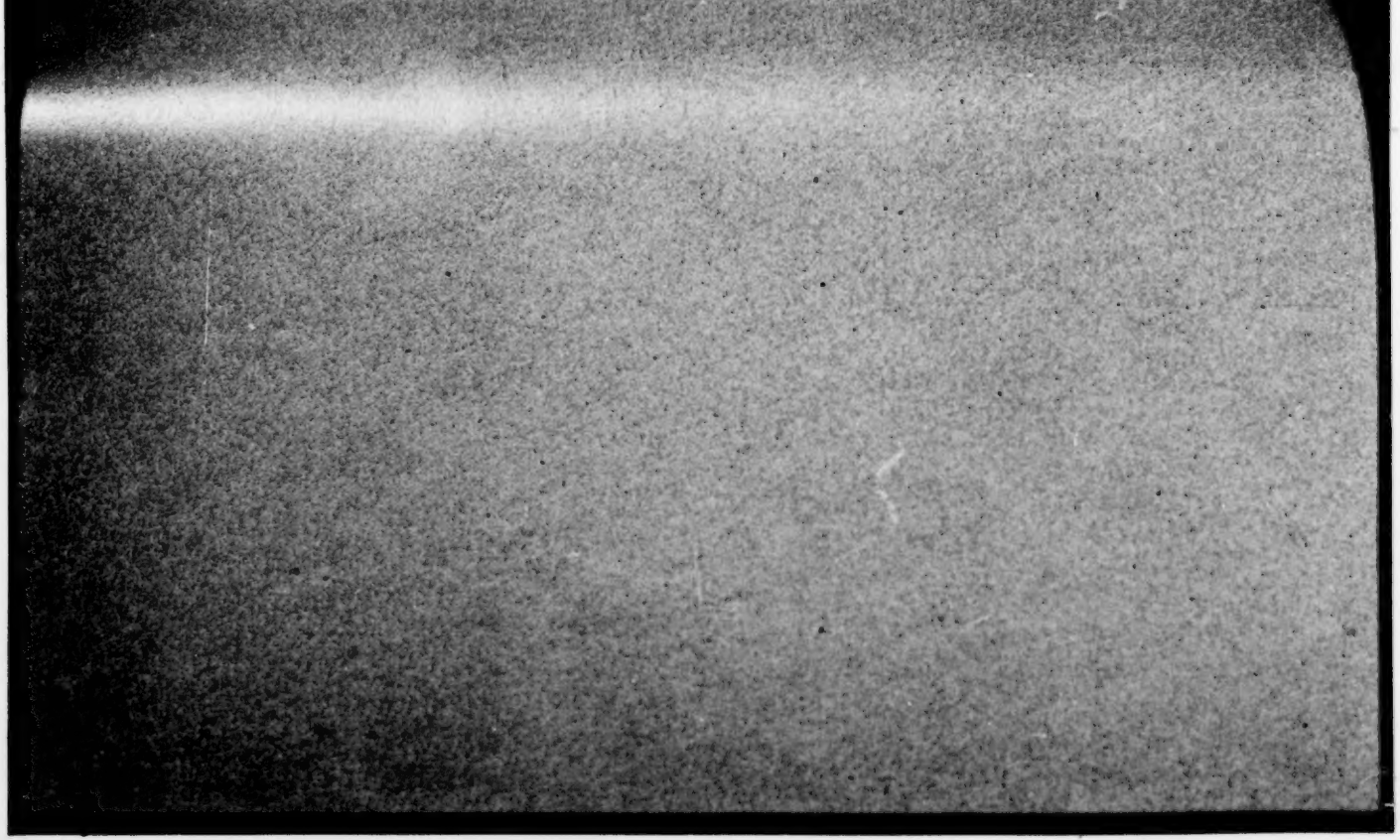
vs.

THE CITY OF PORTLAND, THE BOARD OF PUBLIC WORKS, THE COMMON COUNCIL OF SAID CITY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED APRIL 27, 1901.

(18,136.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 26, 1901.

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1 In the Supreme Court of the United States.

A. N. KING, P. J. MANN, A. S. NICHOLS, THE MULTnomah Investment Company, a Corporation, and Fred N. Pendleton, Plaintiffs in Error,

vs.

THE CITY OF PORTLAND, THE BOARD OF PUBLIC Works, The Common Council of said City, D. H. McLaughlan, Chief of Police; A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works, and W. M. Lind and Joseph M. Manning, Partners under the Firm Name of Lind & Manning, Defendants in Error.

Stipulation.

It is hereby stipulated between the parties to this suit that the form of stipulation in this cause, filed on the — day of March, 1901, may be withdrawn, and that this stipulation shall be substituted in its place.

It is hereby stipulated that the clerk of the supreme court of Oregon, may for his transcript of record on the writ of error herein to the Supreme Court of the United States, use a printed copy of the abstract of record, filed in the supreme court of Oregon, which shall be duly certified to as such copy, and that certified copies of the rest of the record shall be made as required by law.

PIPES & TIFFT,
Attorneys for Plaintiffs.
J. M. LONG,
Attorneys for Defendants.

Indorsed: "Filed Apr. 3 1901, J. J. Murphy, clerk, by J. W. Reeves, deputy."

2 Nov. 5, 1900.

In lieu of transcript.

In the Supreme Court of the State of Oregon, March Term, 1900.

A. N. KING, P. J. MANN, A. S. NICHOLS, THE MULTNOMAH INVESTment Company, a Corporation, and Fred N. Pendleton, Plaintiffs and Appellants,

vs.

THE CITY OF PORTLAND, THE BOARD OF PUBLIC WORKS, THE Common Council of said City, D. H. McLauchlan, Chief of Police; A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works, and M. W. Lind and Joseph M. Manning, Partners Doing Business under the Firm Name of Lind & Manning, Defendants and Respondents.

Appeal from the judgment and decree of the circuit court for Multnomah county—Hon. John B. Cleland, judge.

Appellants' Abstract of Record.

Pipes & Tifft, attorneys for appellants.
J. M. Long and R. R. Dunniway, attorneys for respondents.

Filed Jul- 20, 1900.

J. J. MURPHY, *Clerk*,
By J. W. REEVES, *Deputy*.

3 In the Supreme Court of the State of Oregon, March Term, 1900.

A. N. KING, P. J. MANN, A. S. NICHOLS, THE MULTNOMAH Investment Company, a Corporation, and Fred N. Pendleton, Plaintiffs and Appellants,

vs.

THE CITY OF PORTLAND, THE BOARD OF PUBLIC WORKS, THE Common Council of said City, D. H. McLauchlan, Chief of Police; A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works, and M. W. Lind and Joseph M. Manning, Partners Doing Business under the Firm Name of Lind & Manning, Defendants and Respondents.

Appeal from the judgment and decree of the circuit court for Multnomah county—Hon. John B. Cleland, judge.

Appellants' Abstract of Record.

4 On the 26th day of September, 1899, the plaintiffs and appellants filed in the circuit court of Multnomah county, a complaint in words and figures following, to wit:

(Title.)

Come now the plaintiffs and for cause of suit, allege the following facts, to wit:

That the defendants, Lind & Manning at all the times herein mentioned, were and are partners, doing business as public contractors in the city of Portland.

That the defendant D. M. McLauchlan at all the times herein mentioned, was and is the duly elected and acting chief of police of the said city of Portland.

That the board of public works at all times herein mentioned, was and is a duly organized public body under and by virtue of an act of the legislature of the State of Oregon, and exercising certain powers of the said city.

That the common council at all the times herein mentioned was and is a public body authorized by law to exercise powers pertaining to the city of Portland.

5 That the plaintiff, The Multnomah Investment Company during all the times hereinafter mentioned was and is a corporation duly organized and existing under the laws of the State of Oregon.

That the plaintiffs are the owners of and in the possession respectively of the property hereinafter described and referred to, situated in the city of Portland, in that part thereof that was formerly the city of East Portland, to wit: the plaintiff A. N. King was and is owner of lot 8 in block 16, P. J. Mann of lots 3 and 4 in block 46, A. S. Nichols of lots 5 and 6 in block 46, The Multnomah Investment Company, of lots 3, 4, 5 and 6, in block 57, and Fred N. Pendleton on lot 2 in block 56, as the same are numbered upon the plot of the said East Portland, in the city of Portland, Oregon.

That blocks 17, 46, 57 and 86 lie along and contiguous to the north side of East Yamhill street in said city, and blocks 16, 47, 56 and 87 along the south side of said street, between the east curb line of East Water street, and the west line of Union avenue in said city, all of said streets being public streets in said city.

The plaintiffs further allege that lots 4 and 5 of block 46 lie contiguous to, and abut on the north side of said East Yamhill

6 street, and that lots 3 and 6 of said block lie contiguous to lots 4 and 5 immediately north thereof. That lots 4 and 5 of block 57 abut on the north side of East Yamhill street, and lots 3 and 6 of block 57 adjoin them on the north. That lot 8 of block 16 abuts on East Yamhill street on the south side thereof. That lot 2 of block 56 does not abut on East Yamhill street, but lies immediately south of lot 1 of said block, which abuts on East Yamhill street.

That on the 16th day of November, 1898, W. B. Chase, who was then and there duly elected and acting city engineer for the city of Portland, addressed to the common council of said city a communication wherein he recommended to the said council that East Yamhill street in said city should be improved from the east curb line of East Water street to the west line of Union avenue in the following manner: by grading the intersection of East First street to the established grade and covering the roadway full width with 4 x 12 in. yellow fir planks on mud sills, and by constructing an elevated roadway from the west line of Union avenue to the east line of East

First street, and from the west line of East First street to the east curb line of East Water street, the work to be done in accordance with plans and specifications to be furnished by the city engineer.

7 That the said communication was considered by the said city council, and the same day the said city council, in legal session convened, passed and adopted a resolution to the effect that notice be given that the common council proposed to improve East Yamhill street from the east curb line of East Water street to the west line of Union avenue in the manner in all respects recommended by the said city engineer in the said communication aforesaid, and that said improvement should be made in accordance with the plans and specifications filed in the office of the auditor of the city of Portland on the 16th day of November, 1898.

That the said city engineer on the 16th day of November, 1898, duly filed his specifications for the said work, wherein was set forth with particularity the nature and character of said proposed improvement, and which required the said elevated roadway to be constructed upon pile bents, the piles to be driven into the ground, and with joists and floor covering; a more minute description of the said specifications not being deemed pertinent in this complaint.

That the said communication was considered by the said city council, and the same day, the said city council, in legal session convened, passed and adopted a resolution to the effect that notice be given that the common council proposed to improve East

8 Yamhill street from the east curb line of East Water street to the west line of Union avenue in the manner in all respects recommended by the said city engineer in the said communication aforesaid, and that said improvement should be made in accordance with the plans and specifications filed in the office of the auditor of the city of Portland on the 16th day of November, 1898.

That the said city engineer, on the 16th day of November, 1898, duly filed his specifications for the said work, wherein was set forth with particularity the nature and character of said proposed improvement, and which required the said elevated roadway to be constructed upon pile bents, the piles to be driven into the ground, and with joists and floor covering; a more minute description of the said specifications not being deemed pertinent in this complaint.

That on the 23rd day of November, 1898, in pursuance of the direction of the common council as aforesaid the city engineer gave notice by posting that the common council intended to improve East Yamhill street between the points and in the manner set forth in the said specifications, which were referred to in said notice, and proof of the said posting was duly made to the said city council on the 23rd day of November, 1898, and said notice was also published in the "Daily Times," a daily newspaper of general circulation, daily from the 23rd day of November to the 31st day of December, 1898. And the said notice further specified that the time for filing objections to and remonstrances against said work, as provided in

9 sec. 129 of the city charter, would expire on the 12th day of December, 1898.

That on the 12th day of December, 1898, the plaintiff, F. N. Pendleton, and the Multnomah Investment Company, together with the other persons affected by said improvement, duly filed and presented to the said common council, their remonstrance against said improvement, and stated therein as their reason therefor that they deemed the cost of the same is not warranted by the benefits that would accrue to the properties by reason of said improvement. On the 21st day of December, 1898, the common council upon the report to that effect made by the committee on streets, overruled said remonstrance, and refused to give effect to the same.

That the said common council, on the 21st day of December, 1898, passed an ordinance, No. 11060, which was approved by the mayor on the 22nd day of December, 1898, which ordinance pretended to provide for the time and manner of improving said East Yamhill street between the points, and in the manner hereinbefore set forth and according to the specific action hereinbefore referred to, and further provided that the improvement should in all respects be done and completed in conformity with the provisions of the charter and ordinance No. 9283, entitled, "An ordinance in relation to the improvement of streets," except as otherwise provided in the said ordinance No. 11060. That the title of said ordinance No. 11060 is to wit: "An ordinance providing for the time and manner of improving East Yamhill street from the east curb line of East Water street to the west line of Union avenue."

10 And the ordinance further provided that the said improvement should be completed to the satisfaction of the board of public works, and that the contract for the said improvement should contain a stipulation to the effect that the person, firm, or corporation to whom the contract was let should look for payment only to the fund to be assessed upon the property liable to pay for such improvement and collected and paid into the city treasury for that purpose, and that they should not require the city of Portland, by any legal process or otherwise, to pay the same out of any other fund, and that the contract should be subject to the provisions of the charter, and an ordinance numbered 9183 entitled "An ordinance to protect the material men, laborers and subcontractors who furnish labor or material to contractors for the improvement of streets or construction of sewers," and ordinance No. 9248, as amended, entitled, "An ordinance to regulate the time and manner of improving streets and constructing sewers, and to determine the cost thereof; also to regulate the manner of letting contracts for the improvement of streets and construction of sewers, accepting work done thereunder and drawing warrants in payment therefor," and the said ordinances and charter shall be expressly referred to and made a part of said contract or contracts. And the said ordinance No. 11060 further provided that the said improvement should be fully completed within ninety days from the date of notice of the award of the contract therefor.

That on the 23rd day of January, 1899, the city engineer reported to the common council his estimate of the amount of lumber

11 and material that would be required to make said improvement, segregating and designating the amount opposite to

each lot affected thereby, but in said report or otherwise, did not make or report any estimate of the probable cost of said improvement, and the said common council did not, before making said improvement, or at any time, estimate the probable cost thereof or give any notice of the said probable cost.

That on the 17th day of January, 1899, the chairman and clerk of the board of public works of the said city, gave notice by publication in a newspaper in said city that sealed proposals would be received at the office of the clerk of the board of public works of the said city, until January 24, 1899, at 9.30 o'clock a. m., for the improvement of East Yamhill street as hereinbefore described, and setting forth the particulars of the proposed contract as hereinbefore provided for in the ordinance No. 11060, and referred to in the estimate of said work both for earthworth and woodwork on file in the office of the clerk of the board of public works.

That thereafter the defendants, Lind & Manning, among other bidders, furnished sealed proposals for said work to the board of public works, and promised to do the said work according to the proposals, as follows:

Opposite blocks 17 and 16	$1,753 12
Opposite blocks 46 and 47	1,487 44
Opposite blocks 57 and 56	1,718 82
Opposite blocks 86 and 87	1,602 24
And for the total	$6,562 22

12 And the said Lind & Manning, being the lowest bidders, the said board of public works then and there awarded the contract for said improvement to them for the sum of $6,562.22, and thereafter the said Lind & Manning gave their undertaking for the proper performance of the said work, which was duly approved and entered upon the performance of their said contract.

And thereafter the said William B. Chase, city engineer, duly reported to the board of public works of said city, that the said contract had been fully completed in accordance with the ordinances and requirements, and in accordance with the contract; and the said board of public works, on the 23rd day of May, 1899, duly approved and accepted said work. And that prior to said improvement, to wit, on the 9th day of May, 1899, by order of the board of public works, A. N. Gambell, the clerk thereof, gave notice by publication that the city engineer had filed his notice that the said contract was fully completed as required by the charter and ordinances of the said city, and that objections to the acceptance of such improvement might be filed with said board on or before the 16th day of May, 1899.

That on the 16th day of May, 1899, the common council passed an ordinance which was approved by the mayor on the 18th day of May, 1899, numbered 11224, and entitled, "An ordinance declaring the probable cost of improving East Yamhill street, from the east curb line of East Water street to the west line of Union ave-
13 nue," assessing the same, and directing an entry of such assessment in the docket of city liens, wherein and whereby

he common council pretended to ascertain the probable cost of the id improvement as hereinbefore set forth, and declared that the id probable cost was $6,850.96, and pretended to declare that the id sum was by said ordinance assessed to the several lots and parts f lots in the respective amounts set opposite the number and deription thereof in section 3 of said ordinance, and directed the uditor to enter a statement of the said assessment made in the ocket of city liens, and to cause notice thereof to be published as rovided in the city charter. That the said section 3 of said ordiance designated said assessments as follows:

Block.	Lot.	Owner.	Asses ment.
17	4	Thomas Hislop	$359 23
17	3	Thomas Hislop	22 96
17	6	Thomas Hislop	52 20
17	5	Thomas Hislop	476 35
46	4	P. J. Mann	334 64
46	3	P. J. Mann	14 35
46	6	A. S. Nichols	43 13
46	5	A. S. Nichols	369 72
57	4	Multnomah Inv. Co.	395 91
57	3	Multnomah Inv. Co.	44 02
57	6	Multnomah Inv. Co.	47 23
57	5	Multnomah Inv. Co.	413 81
86	4	B. Wernberg	421 96
86	3	B. Wernberg	47 39
86	5	B. Wernberg	374 15
16	1	Joseph Paquet	358 95
16	2	Joseph Paquet	23 20
16	7	H. W. Ross	53 07
16	8	H. Listman	501 42
4			
47	1	Buffalo Pitts Co.	335 40
47	2	Buffalo Pitts Co.	14 37
47	7	Buffalo Pitts Co.	43 15
47	8	Buffalo Pitts Co.	369 55
56	1	C. B. Bellinger	392 41
56	2	Fred N. Pendleton	43 79
56	7	C. B. Bellinger	46 63
56	8	Ellis G. Hughes	402 22
87	1	H. H. Emmons	423 66
87	2	H. H. Emmons	47 44
87	8	H. H. Emmons	374 65
		Total	$6,850 96

And the said ordinance further authorized the mayor and auditor o draw warrants on the fund pretended to be created by the said rdinance in favor of the persons entitled thereto whenever any part f the improvement for which the said assessment was levied was ccepted by the board of public works.

That in pursuance of the direction of the city council, the auditor entered the amount of the assessments upon the plaintiffs' property as aforesaid in the docket of city liens against the said property, and the said assessments appear thereon unsatisfied and apparently a lien upon the property of the plaintiffs, which entries constitute a cloud upon the plaintiffs' title to their said property.

That lot 8, block 16, assessed to H. Listman by said ordinance, since the said assessment was duly sold, granted and conveyed by the said H. Listman to the plaintiff, A. N. King.

15 And on the 16th day of May, 1899, the common council passed an ordinance which was approved on the 18th day of May, 1899, and numbered 11225 and entitled "An ordinance making an appropriation out of the fund for the improvement of East Yamhill street from the east curb line of East Water street to the west line of Union avenue," and wherein and whereby the said common council pretended to appropriate the sum of $6,850.96 out of the fund for the improvement of said East Yamhill street as aforesaid, to provide for the expense of improving said street.

The plaintiffs allege that said ordinance No. 11224 aforesaid, pretending to declare the probable cost of said improvement, was not passed, nor was any other ordinance declaring said probable cost passed, until after the said contract had been let and fully completed, and after the same had been accepted by the board of public works and the warrants ordered drawn therefor by the common council.

That on the 9th day of May, 1899, the city engineer reported to the board of public works the expenses for the preliminary work, preparing plans and specifications, surveying and setting grade stakes, and services of inspector in the sum of $278.90, which the board of public works approved, and the said sum was added to the cost of improvement and included within the same designated by the said ordinance No. 11224.

16 That when the said ordinance making said assessment was passed, the said common council caused a notice of the said assessment to be given to each of the owners of the property affected by said assessment of the amount thereof, and required the said owners to pay the amount of their assessments respectively within ten days from said notice.

That thereafter, on the 15th day of September, 1899, the plaintiffs not having paid their said pretended assessments, or any part thereof, the common council caused a warrant to be issued in form as required by law, directed to the defendant, D. M. McLaughlin, who was then and there, and is now the chief of police of said city of Portland, commanding him to levy upon and advertise and sell, as provided by the charter and ordinance of the said city, the said property of the plaintiffs, and to make out of said sale the amounts of said assessments, respectively.

That the said chief of police now holds said warrant and has notified in writing each of the plaintiffs that unless they pay the amount of the said assessments within three days he would proceed to advertise and sell the said property in the manner required

by law, at public auction, and out of the proceeds of said sale pay the amount of said assessments and costs of collection. And the said D. M. McLaughlan will, unless restrained by this court, offer the said property for sale, and sell the same to purchasers and give the certificates and deeds therefor provided by the ordinances and charter of the city of Portland, which proceedings, certificates and deeds will constitute a cloud upon the title of the plaintiffs' property, as aforesaid.

17 The plaintiffs allege that in making the assessments upon the property of the plaintiffs as aforesaid, the common council did not take into consideration whether the property of the plaintiffs was benefited by the said proposed improvement, or the amount, if any, of said benefits, and did not apportion the costs of making said improvement, according to the benefits to the said property, derived from the said improvement; but on the contrary assessed to each lot abutting on said street the cost of the improvement on the half street in front of it, and assessed on the lots not abutting on the street for the improvement of the intersection of said street, four-ninths of the cost of said intersection nearest thereto. And in making said assessments, the common council pretended to make the same in pursuance of the provisions of section 138, of the act of the legislature incorporating the city of Portland, filed in the office of the secretary of state on the 17th day of October, 1898.

The plaintiffs allege that the said improvement consists of an elevated roadway from 20 to 35 feet high, and owing to the unevenness of the ground thereunder, higher in some places than others, and by reason thereof the cost of making said elevated roadway is not uniform along its length, but varies constantly from point to point, as shown by the assessments hereinbefore set forth, the cost of each abutting lot and to the other lots assessed are not equal or uniform.

Plaintiffs further allege that their said property is not used, and cannot be used in connection with said elevated roadway, and is not accessible or any part of it, from the said elevated roadway,

18 but that the said property lies wholly far below the level of said roadway, and by reason of its physical situation said property is not, and cannot be benefited in any particular by the said roadway, and that the costs so assessed against said property far exceed any possible benefits that may accrue to the said property, if any, by reason of the said improvement.

The plaintiffs allege that they did not have, or either of them, any notice or knowledge of the amount of said assessments so pretended to be assessed against their said property at any time before the same was made or before the same was entered in the docket of city liens, or before the said contract was fully completed by the contractors as aforesaid, and had no opportunity to be heard to contest the fairness of said apportionment or whether their said property was benefited or the amount of said assessments; but that said assessments were made and entered in the city lien docket without any notice thereof, and the charter and ordinances of the said city of Portland do not

provide for any notice to be given of the making of said assessments to the property-owners affected by the same.

Plaintiffs further allege that in making said assessments, the common council, and in accepting same the board of public works acted arbitrarily and unjustly, and did not use or exercise any discretion or judgment concerning the same.

The plaintiffs allege that by reason of the premises all of
19 the said proceedings hereinbefore set forth as affecting the property of the plaintiffs and the assessments as aforesaid, and the pretended lien in the city lien docket on said property, and the threatened sale thereof by the defendant, the chief of police, were and are null and void, and constitute an attempt by the said city and its authorities and officers to take the property of plaintiffs away from them without due process of law, and contrary to the fourteenth amendment of the Constitution of the United States of America, prohibiting any State from taking any property without due process of law, and contrary to the constitution of the State of Oregon, and that said proceedings violate section 4 of article 11 of the State constitution, section 32 of article 1 of said constitution, and section 18 of article 1 of said constitution of the State.

The plaintiffs further allege that the provisions of the act of the legislature, incorporating the city of Portland aforesaid, in respect of improvements and assessments for making the same upon the property affected, are null and void, and opposed to the provisions of the fourteenth amendment of the Constitution of the United States, and of the provisions of the State constitution hereinbefore referred to, and in this particular, that the method of assessment provided in said act and in the ordinance passed in pursuance thereof, make the said assessments depend solely upon the costs of the improvements on the half street in front of the said property, and not in any manner upon the question whether the said property is benefitted by the same; and also in this, that the cost of the
20 whole improvement is not permitted or authorized to be apportioned among or between the owners of property affected by said improvement, but that each said lot assessed is by the said charter and ordinances made a taxing district.

Wherefore the plaintiffs pray that an injunction may issue against the said defendant, The City of Portland and its officers, and against the said D. M. McLaughlan, as chief of police of said city, restraining and enjoining it and them and him from selling the said property for the collection of the said assessments; and that a decree may be made that all of the said ordinances and proceedings and assessments against the plaintiffs' property and the entry in the docket of city liens thereof, may be declared null and void, and that the same may be directed to be cancelled of record and the apparent lien thereof upon the plaintiffs' property removed, and for their costs and disbursements.

Demurrer.

Afterwards, and on the 6th day of October, 1899, the defendants and respondents filed in said court, their demurrer, in words and figures as follows, viz:

(Title.)

Now, and at this time, come the defendants and demur to the complaint filed herein, for the reason that the same does not state facts sufficient to constitute a cause of suit.

Order.

Afterwards, and on the 23d day of October, 1899, the court
21 made the following order, as follows, viz:

(Title.)

At this time, by consent, the demurrer to the complaint is overruled and defendants are allowed ten days to answer.

Answer.

Afterwards, and on the 2nd day of November, 1899, the defendants and respondents filed in said court, their answer, in words and figures as follows, viz:

(Title.)

Comes now the defendants and for answer to the complaint filed herein:

Deny that the city engineer did not make or report any estimate of the probable cost of said improvement mentioned in the complaint, and

Deny that said common council did not, before making said improvement, or at any time, estimate the probable cost thereof or give any notice of the said probable cost.

Deny that in making the assessments upon the property of the plaintiffs as set forth in said complaint, the common council did not take into consideration whether the property of the plaintiffs was benefited by said proposed improvement, or the amount, if any, of said benefits; and

22 Deny that said common council did not apportion the cost of making the said improvement according to the benefits to the said property derived from said improvement.

Defendants allege that the common council did take into consideration whether the property of the plaintiffs was benefited by said proposed improvement and the amount of said benefits, and did apportion the cost of making said improvements according to the benefits of said property derived from said improvements, and said common council, in making said assessments in all things complied strictly with the present charter of the city of Portland, the same being an act to incorporate the city of Portland, and to provide a

charter therefor, and to repeal all laws or parts of acts in conflict therewith, enacted by the Legislative Assembly of the State of Oregon and filed in the office of the secretary of state, October 17, 1898, and published in the Laws of Oregon, special session of 1898, pages 101 to 187, inclusive.

Deny that the said property set forth in the com- is not used or cannot be used in connection with said elevated roadway; and

Deny that no part of it is accessible, or that said property is not accessible from said elevated roadway; and

Deny that by reason of the physical situation of said property, that the same is not and cannot be benefited in any particular by said roadway.

23 And defendants deny that the costs so assessed against said property have exceeded, or in any way exceed or equal the possible benefits that may accrue to the said property by reason of said improvement.

The defendants allege the fact to be that said roadway benefits said property far in excess of the cost assessed against said property for said improvement.

Defendants deny that plaintiffs and each of them did not have notice or knowledge of the amount of said assessments before the said assessments were made or before the same were entered in the docket of city liens, or before said work was fully completed by said contractors, as set forth in the complaint.

And defendants deny that plaintiffs, or any of them, did not have an opportunity to be heard to contest the fairness of said apportionment.

Also defendants deny that plaintiffs, and each of them, did not have an opportunity to contest the question whether their said property was benefited and as to the amounts of said assessments.

Defendants deny that said assessments were made or entered on the city lien docket without any notice thereof, and deny that the charter and ordinances of said city of Portland did not provide for any notice to be given of the making of said assessments to the property-owners affected by the same.

24 Defendants deny that in making said assessments, the common council acted arbitrarily or unjustly, or that the said common council did not use or exercise any discretion or judgment concerning the same.

And defendants deny that in accepting the same the board of public works acted arbitrarily or unjustly, or did not use or exercise their discretion or judgment concerning the same.

Defendants deny that by reason of the premises all of such proceedings hereinbefore set forth as affecting the property of plaintiffs or the assessments as mentioned in the complaint or the lien in the city lien docket on said property, or the threatened sale thereof by the defendant, the chief of police, were or are null and void, or constitute an attempt by said city and its authorities and officers to take the property of plaintiffs away from them without due process of law or contrary to the fourteenth amendment to the Constitution of the United States of America, prohibiting any State from taking prop-

erty without due process of law, or contrary to the constitution of the State of Oregon, or that said proceedings violate section 4, of article 11 of the State constitution, or section 32 of article 1 of said constitution, or section 18 of article 1 of said constitution of the State.

Defendants deny that the provisions of the act of the legislature incorporating the city of Portland, as set forth in the complaint, or otherwise, in respect to improvements or assessments for making the same upon the property affected are null and void, or opposed
25 to the provisions of the fourteenth amendment of the Constitution of the United States or of the State constitution hereinbefore referred to, or in this particular that the method of assessments provided in said act or in the ordinances passed in pursuance thereof make the said assessments depend solely upon the cost of the improvement of ½ the street in front of said property and not in any manner upon the question whether the said property is benefited by the same, or also, in this, that the cost of the whole improvement is not permitted or authorized to be apportioned among or between the owners of property affected by said improvement, but that each lot assessed is by said charter and ordinance made a taxing district.

Wherefore, defendants having fully answered the complaint filed herein, pray that said complaint be dismissed and that they may recover a decree for their costs and disbursements incurred herein.

Order.

Afterwards, and on the 28th day of December, 1899, the court made the following order, as follows, viz:

(Title.)

Now, at this time, this cause comes on regularly for trial, plaintiffs appearing by Pipes & Tifft, the defendant appearing by J. M. Long, Chamberlain, Thomas & Kraemer. The court after hearing the testimony of witnesses and argument of counsel, and not being fully advised in the premises, takes the same under advisement.

26 Afterwards, and on the 8th day of January, 1900, the court made the following findings of fact, as follows, viz:

(Title.)

This cause having heretofore been tried by the court, testimony taken and arguments made, and the court being now fully advised in the premises, makes the following

Findings of Fact.

That the city engineer did make a report and estimate of the probable cost of the improvement mentioned in the complaint.

That the common council did, before making said improvement, estimate the probable cost thereof and give notice of the said probable cost.

That in making the assessments upon the property of the plaintiff,

set forth in the complaint, the common council did take into consideration whether the property of plaintiffs was benefited by said proposed improvements and the amount of said benefits.

That said common council did apportion the cost of making the said improvement according to the benefits to the said property from said improvement.

That the property set forth in the complaint can be used in connection with the said elevated roadway, and it is accessible
27 from said elevated roadway, and it is so situated that it is and can be benefited by said roadway.

That the costs assessed against said property do not exceed or equal the benefits that have accrued to said property by reason of said improvement.

That plaintiffs, and each of them, did have notice of the amount of said assessment before the said assessments were made and before the same were entered in the docket of city liens and before said work was fully completed by said contractors and said plaintiffs and each of them did have an opportunity to be heard to contest the fairness of said apportionment. And plaintiffs, and each of them, did have an opportunity to contest the question whether their said property was benefited and the amounts of the benefits, and also as to the amounts of the assessments.

That said assessments were not made or entered on said city lien docket without any notice.

That in making said assessments the common council did not act arbitrarily or unjustly, and that the common council did use and exercise discretion and judgment concerning said assessments and the amounts thereof.

That in accepting said improvement the board of public works did not act arbitrarily or unjustly, and said board of public works, in accepting said improvement did use and exercise their discretion and judgment concerning the same.

28 That upon the giving of the notice of intention to make said improvement, and prior to the passage of the time and manner ordinance set out in plaintiffs' complaint, the common council considered the question of cost of said improvement in front of each of the *the* lots within the limits of the proposed street improvement and abutting upon said street, and also the proportionate share of the cost of improving intersections of two of the streets bounding the blocks in which such lot is situated and found that each of said lots abutting on said street, and each of said lots assessed for intersection of blocks would be benefited by said improvement in an amount greater than the cost of said improvement as assessed against each of said lots.

That the plaintiffs have failed to establish any of the allegations of the complaint denied by the defendants' answer.

Conclusions of Law.

That the proceedings set forth as affecting the property of plaintiffs and the assessment as mentioned in the complaint and the lien

in the city lien docket of said property and the threatened sale thereby by said defendant, the chief of police, were and are regular and valid and did not constitute an attempt by said city and its authorities and officers to take the property of plaintiffs away from them without due process of law or contrary to the fourteenth amendment of the Constitution of the United States of America, prohibiting any State from taking property without due process of law, or contrary to the Constitution of the United States of America; and that said proceedings do not violate section 4 of article 11 of the said State constitution, and do not violate section 32 of article 1 of the constitution of Oregon, and do not violate section 18 of article 1 of the constitution of Oregon.

That the provisions of the act of the legislature incorporating the city of Portland, as set forth in the *the* complaint, in respect to improvements and assessments for making the same upon the property affected are valid, lawful and constitutional, and are not opposed to the provisions of the fourteenth amendment to the Constitution of the United States or of any provision of the constitution of the State of Oregon.

Additional Findings of Fact.

Afterwards, and on the same day, the court made the following additional findings of fact, as follows, viz:

(Title.)

It having been stipulated in open court by the plaintiffs and defendants, by their respective attorneys, as follows: "It is stipulated in open court by the parties hereto, that the plaintiffs, and each of them will swear that they did not have any notice or knowledge of the amount of the assessments before the assessments were made or before the same were entered into the docket of city liens, or before said work was fully completed by said contractors other than as stated in the complaint and the proceedings therein set forth." And as a finding of fact in accordance with the said stipulation, the court finds that the plaintiffs, and each of them did not have any notice or knowledge of the amount of the assessments before the assessments were made, or before the same were entered into the docket of city liens, or before said work was fully completed by said contractors other than as stated in the complaint and the proceedings therein set forth.

Decree.

Afterwards, and on the 8th day of January, 1900, the court made the following decree, as follows, viz:

(Title.)

This cause having heretofore come on regularly for trial, the plaintiffs appearing by their attorneys and the defendants appearing by attorney, testimony was taken, arguments of counsel made, and

the court being now fully advised in the premises has made findings of fact and conclusions of law.

At this time, on motion of attorney for defendants for a decree upon the findings of fact and conclusions of law heretofore made and entered.

It is ordered, adjudged and decreed that the suit of A. N. King, P. J. Mann, A. S. Nichols, The Multnomah Investment Company, a corporation, and Fred N. Pendleton, plaintiffs, against The City of Portland, The Board of Public Works, The Common Council of said City, D. M. McLaughlin, chief of police, A. N. Gambell,
31 auditor of said city and the clerk of the board of public works, and M. W. Lind and Jos. M. Manning, partners, doing business under the firm name of Lind & Manning, the same being a suit to enjoin the collection of the assessment levied by said city for the purpose of paying for the improvement of East Yamhill street, from East Water street to Union avenue, be, and the same is hereby dismissed.

And it is further ordered, adjudged and decreed that the defendant, The City of Portland, do have, and recover from the plaintiffs, A. N. King, P. J. Mann, A. S. Nichols, The Multnomah Investment Company, a corporation, and Fred N. Pendleton, its costs and disbursements incurred herein, and taxed at $27.60.

Afterwards, and on the 16th day of June, 1900, the plaintiffs and appellants, perfected an appeal to the supreme court of the State of Oregon, by serving upon the defendants a notice of appeal and filing a bond conditioned according to law.

Assignment of Errors.

1. The court erred in holding that the charter of the city of Portland is not in conflict with the following provisions of the constitution of the State of Oregon, to wit: article 1, section 18, in this, that said charter provides for the taking of private property for public use without just compensation. And with article
32 1, section 10 thereof, in this, that the plaintiff by said charter, is deprived of his remedy by due course of law for the injury done him in person and property by the said assessment, and also with article 9, section 1, in this, that the said law does not provide for uniform and equal rate of assessment and taxation for said improvement, and does not prescribe such regulations as secure a just valuation for said taxation of the property effected by said assessments. And article 1, section 32 of the said constitution of the State of Oregon, in this, that the taxation provided for in such charter is not equal and uniform.

2. The court erred in deciding that the said charter of the city of Portland is not in conflict with the fourteenth amendment of the Constitution of the United States, in this, that it provides for the taking of plaintiff's property without due process of law; and also in conflict with the fourteenth amendment of the Constitution of the United States, in that it provides for taking plaintiff's property without just compensation.

3. The court erred in holding that notice to the plaintiff was not necessary before the said common council could make a valid assessment for the said repairs against its property.

4. The court erred in holding that the plaintiff had notice before said assessments were made.

5. The court erred in deciding that the provision of the
33 charter of the city of Portland, under and by virtue of which the plaintiff built the bridge in question, is not a contract, and the said charter does not impair the obligation of said contract, which holding is in conflict with the Constitution of the United States, that provides that a State shall not pass any law impairing the obligation of contracts.

6. The court erred in holding that the city engineer did make a report and estimate of the probable cost of the improvement.

7. The court erred in holding that the common council did, before making said improvement, estimate the probable cost thereof and give notice of said probable cost.

8. The court erred in holding that said common council did apportion the cost of making the said improvement according to the benefits to the said property from said improvement.

9. The court erred in holding that the property set forth in the complaint can be used in connection with said roadway, or that it is accessible from said elevated roadway, or that it is or can be benefited by said roadway.

10. The court erred in holding that the costs assessed do not exceed the benefits.

11. The court erred in holding that the plaintiffs, or either of them, had notice of the amounts of their respective assess-
34 ments before the same were made or entered in the city lien docket, or before the work was completed, or that either of them had an opportunity to be heard to contest the fairness of said apportionment or the benefits or assessments.

12. The court erred in holding that the common council or the board of public works did not act arbitrarily or unjustly or used discretion and judgment.

13. The court erred in holding that the council had jurisdiction to assess the cost against the plaintiffs' property after the work had been fully completed by the contractor.

14. The court erred in holding that the council could make the assessments without taking into consideration the benefits or injuries.

15. The court erred in holding that notice was not necessary before the common council could make a valid assessment.

16. The court erred in holding that the benefits to the property could be estimated upon the assumption that the property might be built on so as to bring the same up to the grade of the roadway.

35 It is hereby stipulated and agreed that the within case may be tried in the supreme court of Oregon upon a printed abstract in lieu of a transcript, and a typewritten copy of evidence and exhibits attached, certified to by court in lieu of transcript, said

abstract to contain correct copies of pleadings and findings of fact and conclusions of law and decree. If within abstract has through inadvertence, any inaccuracies it may be corrected by supplemental abstract.

July 18, 1900.

RALPH DUNIWAY,
Of Att'ys for Respondents.
PIPES & TIFFT,
Att'ys for App'l'ts.

Due service of within abstract is hereby accepted in Portland, Multnomah county, Oregon, this 18th day of July, A. D. 1900.

RALPH R. DUNIWAY,
Of Attorneys for Respondents.

36 In the Circuit Court of the State of Oregon for Multnomah County.

A. N. KING, P. J. MANN, A. S. NICHOLS, THE MULTNOMAH Investment Company, a Corporation, and Fred N. Pendleton, Plaintiffs and Appellants,

vs.

THE CITY OF PORTLAND, THE BOARD OF PUBLIC WORKS, THE Common Council of said City, D. M. McLaughlin, Chief of Police; A. N. Gambell, Auditor of said City and the Clerk of the Board of Public Works, and W. M. Lind and Jos. M. Manning, Partners Doing Business under the Firm Name of Lind and Manning, Defendants and Respondents.

To the above-named defendants and respondents and to J. M. Long and R. R. Duniway, your attorneys:

You and each of you, are hereby notified that the above appellants hereby appeal to the supreme court of the State of Oregon, from the judgment, order, and decree, made and rendered and entered in the above-entitled cause on the 8th day of Jan'y 1900, which judgment was, and is to the effect that the plaintiffs' complaint be dismissed, and against the plaintiffs and appellants for costs and disbursements, taxed at $27.60, and the appellants appeal from the whole of said decree.

(Signed) PIPES AND TIFFT,
Attorneys for Plaintiffs and Appellants.

STATE OF OREGON, }
County of Multnomah, } *ss:*

Due and legal service of the within notice of appeal is hereby accepted in Multnomah county, Oregon this 16th day of June, 1900, by receiving a copy thereof, duly certified to as such by A. P. Tifft of attorneys for pl'ff- & app'l't-.

(Signed) RALPH R. DUNIWAY,
Of Attorneys for Respondents.

37 Endorsed: Original. No. A 4615 3. In the circuit court of the State of Oregon, for the county of Multnomah. A. N. King, P. J. Mann, A. S. Nichols, *et al.*, plaintiffs and appellants, *vs.* The City of Portland, The Board of Public Works, *et al.*, defendants and respondents. Notice of appeal. Filed June 18th, 1900, Dan. J. Moore, clerk, by Lansing Stout, deputy. Pipes and Tifft 708 711 chamber of commerce Portland, Oregon, attorneys for appellants.

In the Circuit Court of the State of Oregon for Multnomah County.

A. N. KING, P. J. MANN, A. S. NICHOLS, THE MULTNOMAH Investment Company, a Corporation, and Fred N. Pendleton, Plaintiffs and Appellants,

vs.

THE CITY OF PORTLAND, THE BOARD OF PUBLIC WORKS, THE Common Council of said City, D. N. McLaughlin, Chief of Police; A. N. Gambell, Auditor of said City and the Clerk of the Board of Public Works, and M. W. Lind and Jos. M. Manning, Partners Doing Business under the Firm Name of Lind and Manning, Defendants and Respondents.

Undertaking on Appeal.

Whereas the above-named A. N. King, and others, plaintiffs and appellants have taken appeal to the supreme court of the State of Oregon, from the judgment, order, and decree, made, rendered, and entered in the above-entitled cause and court on the 8th day of January, 1900,

Now therefore in consideration of the premises, the said, A. S. Nichols, and E. A. King, surety hereby undertake and promise to the effect that the said appellants will pay all damages, costs, and disbursements which may be awarded against them on the appeal.

(Signed) A. S. NICHOLS, *Appellant.*
(Signed) E. A. KING, *Surety.*

38 STATE OF OREGON, } *ss:*
County of Multnomah, }

I, E. A. King, being first duly sworn, depose and say, I am the surety in the foregoing undertaking on appeal, that I am a resident and householder within the State of Oregon, and that I am worth the sum of $500.00 over and above all of my just debts and liabilities and exclusive of property exempt from executions.

(Signed) E. A. KING.

Subscribed and sworn to before me this 19th day of June, 1900.

(Signed) A. P. TIFFT,
Notary Public.

Indorsed: No. A 4615 3. In the circuit court, of the State of Oregon for the county of Multnomah, A. N. King, P. J. Mann, *et al.* plaintiff- *vs.* City of Portland, Board of Public Works *et al.*, defendant-,

undertaking on appeal, Filed June 20th, 1900, Dan. J. Moore, clerk, by Lansing Stout, deputy. Pipes & Tifft, 708 711 chamber of commerce, Portland, Oregon, attorneys for ——.

STATE OF OREGON, *County of Multnomah,* } ss:

I, J. P. Kennedy, clerk of the circuit court of the county of Multnomah and State of Oregon, do hereby certify that the foregoing copy of notice & undertaking on appeal has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original notice & undertaking on appeal, as the same appears on file in my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 18th day of Dec., A. D., 1900.

[Seal of Circuit Court].

J. P. KENNEDY, *Clerk,*
By LANSING STOUT, *Deputy.*

(Ten-cent revenue stamp.)

Indorsed: "Filed Dec. 19, 1900, J. J. Murphy, clerk."

39 In the Circuit Court of the State of Oregon for the County of Multnomah, Dep't No. 3.

A. N. KING, P. J. MANN, A. S. NICHOLS, THE MULTNOMAH INVESTment Co., a Corporation, and Fred N. Pendleton, Plaintiffs,

vs.

THE CITY OF PORTLAND, THE BOARD OF PUBLIC WORKS, THE Common Council of said City, D. M. McLaughlan, Chief of Police; A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works; M. W. Lind and Jos. M. Manning, Partners Doing Business under the Firm Name of Lind & Manning, Defendants.

Be it remembered, that this cause came on for trial before his honor, John B. Cleland, judge of department No. 3, on the — day of December, 1899, Messrs. Pipes & Tifft appearing on behalf of the plaintiffs, and Mr. J. M. Long and Mr. R. R. Dunniway appearing on behalf of the defendants, whereupon the following proceedings were had and done, to wit:

40 Mr. MARTIN, called as a witness on behalf of the plaintiffs, and after being duly sworn, testified as follows:

Direct examination.

Questions by Judge PIPES:

Q. Mr. Martin, what official position do you occupy in the city of Portland?

A. I am one of the councilmen.

Q. How long have you been councilman?

A. I have been in the council,—well, by the first of next July I will be there two terms, four years.

Q. You are a member of the street committee also?

A. Yes sir.

Q. And a member of that committee during the year 1898?

A. Yes.

Q. And now?

A. Yes sir.

Q. And ever since?

A. Yes sir.

Q. Are you acquainted with the improvement on East Yamhill street from the west line of Union avenue to the east line of East First street and from the west line of East First street to a connection with the elevated roadway of East Water street?

A. I am aware that there was such an improvement made but I haven't been over on that street lately.

Q. You know about the improvement?

A. Yes sir.

Q. It was made while you were a member of the council?

A. Yes sir.

Q. And a member of the street committee?

A. Yes sir.

Q. And you were present during the proceedings as a member of the street committee and also of the council?

A. Yes sir.

Q. When the ordinance was passed concerning that improvement?

A. Yes sir.

Q. And all of it?

A. Yes.

Q. Did you examine the premises before the ordinance was passed declaring the improvement?

41 A. Yes sir, I viewed the premises. I went over on the ground; I am familiar with the ground.

Q. Have you examined that since the improvement was put there?

A. Well, I have been over there about two months ago and I think that the improvement at that time was there, or part of it, but I am not aware whether it was complete or not at that time.

Q. As a member of the street committee you examined those premises for the purpose of determining whether or not the improvement should be made, did you?

A. Well, I examined the ground. They asked to open the street as I understand it.

Q. When the petition was made for the improvement you went over to look at it to determine whether the improvement should be made or not?

A. Yes, I am familiar with the ground and the location of the street.

Q. And you made the examination for that purpose?

A. Well, I viewed it, yes. It was asked that the street should be

opened up. Several people there asked to have that street opened up as an open roadway.

Q. Did you not at that time or at any of the times ascertain to whom the property belonged that lay along that improvement?

A. Well, only part of it. I didn't inquire who it all belonged to. I think part of it belongs to what is known as the Buffalo-Pitts Company.

Q. The improvement is some 25 to 30 feet above the land is it not?

A. I don't think it is that high.

Q. How high?

42 A. About 15 feet; from 10 to 15 feet; some places it is higher; from 10 to 15 feet.

Q. Is it uniform in height or is the grade higher in some places than in others?

A. The land does not lay perfectly level; some places the grade is higher than others.

Q. Now, in making this assessment, the council assessed these lots in various sums. For instance, lot 4, in block 17, is assessed at $359.23, and lot 5 in that same block, that lays contiguous to it, is assessed at $476.35. Was lot 5 benefitted more than lot 4 by the improvement?

A. Lot 5? I would have to look that over before I could give you my opinion of it. I would have to look at the location of it. What is lot 4? A corner lot? A corner lot is benefitted generally more than an inside lot; generally considered so.

Q. As I understand, Mr. Martin, and I think there will be no question or dispute about that, lots 4 and 5 lie contiguous to each other and front on the street. Instead of saying front on the improvement I should say the sides of the lot lay along the improvement, lay lengthwise of the improvement; lots 4 and 5, but lot 4 is west of lot 5.

Mr. DUNNIWAY: That line of inquiry is objected to upon the ground that it is incompetent, irrelevant and immaterial.

The COURT: The objection is overruled.

Q. You stated you could not say whether lot 5 benefitted more than lot 4 by the improvement?

43 A. Well, if I had a plot of it and was on the ground I would soon give you my opinion but at present I would have to know just the nature of lots 4 and 5 and what advantage they derived from this improvement before I would state to you my opinion in the matter.

Q. There are 30 lots in that improvement, assessed for it, and it is admitted here in the pleadings that no two of the lots are assessed in the same sum. Will you state how the council and yourself arrived at those sums of money?

Mr. DUNNIWAY: I think it is admitted in the pleadings that the assessments were made in accordance with the provisions of the charter which determines the rate of assessment; therefore I think

the question is incompetent to ask the witness to pass upon matters of law.

Objection overruled. Exception allowed.

A. I am not aware of how that was determined but I presume it was according to the provisions of the charter. I presume that is the way.

Q. And you only took into consideration the cost of the improvement that lay in front of each lot?

A. Costs and benefits I presume.

Q. And assessed that according to what it cost, is that right? You made this assessment on each lot according to the amount of cost of the street immediately in front of it?

A. Well, according to the provisions of the charter and according to the benefits derived from having the street there.

Q. Then you do not state that you took into consideration the benefits that any particular lot would have in making the
44 assessment of the cost of the street.

A. Well, I presume that we did. I presume we considered that the street was a benefit to all that property, otherwise we would not have put it through, and I presume that the property-owners would not have asked to have that street put through if they didn't consider it would enhance the value of that property and of course we considered that it would.

Q. What I asked you, Mr. Martin, was whether or not you took into consideration the benefit which each particular lot derived in fixing the assessment for that lot?

A. I presume we did. I think we considered the interest of every property-owner in there and treated them what we considered right and just according to the provisions of the charter. As those assessments are generally made.

Q. If the charter requires you to assess the cost in front of the lot and not otherwise, will you explain how you took into consideration the benefits to each lot?

A. Each lot?

Q. Yes sir.

A. We considered the benefits to the property where the street went through. I guess we took all the lots separate. I don't know that individually I inquired who owned the property, but there was a petition before us asking for this street.

Q. Did you add up the total cost and then divide that total amongst the lots?

A. I can't remember how that was done; I don't remember.

Q. Now, will you state to the court what benefit that improvement was to lot 4 in block 17?

45 A. Well, I can simply state that if that was my property I would consider that the benefit to the property was a great deal more than the damage. I consider a lot would be of very little use without the street. That is what I should consider.

(Mr. DUNNIWAY:)

Q. By damage you mean cost of the improvement?

A. Yes, cost of the improvement.

Q. Well, this is assessed for $359.23. You think they benefitted that much? Tell the court.

A. Well, I presume it would be benefitted that much by reason of making the lot valuable for business. I assure you that I have got some rough property that I would give $500 if they would only put a street through there and I would gladly pay it. I would consider that my property would be benefitted and I could use it for business; otherwise, if there was no street there I could not use it for business or anything else, therefore I consider that the cost of that street is repaid by the benefits to the property.

Q. I have no doubt that is your opinion. I was trying to get you to tell the court what particular benefit that would be to lot 4.

A. What street does it front on?

Q. Well, I will use that lot to illustrate. Lot 4 is in block 17 and is Thomas Hislop's property.

A. If you will show me a map of it and mark the streets on it I will give you a very candid opinion.

Q. Have you in mind any particular lot?

A. I don't know that I know any particular lot, no sir, it is some time since we acted on that.

46 Q. Now, what benefit did any of the lots derive from that improvement? In what way is that property made more valuable to the owner by that improvement?

A. I think that the owners or any other person who owned that property would consider that opening up that street has improved the property and made it valuable for business, otherwise it would not have been done.

Q. In what way has it made it valuable?

A. By opening up a street where you could get beside the property and do business on it.

Q. This roadway you say lays 15 feet above this property, doesn't it?

A. Well, about 10 feet, I think, is about the average.

Q. Is there any place from that elevated roadway, any point in it where you can go from the roadway on to the property?

A. Yes, I think you can from the Southern Pacific Railroad track; I think this is about on a level with the Southern Pacific where it crosses.

Q. That is you can go from the elevated roadway on to the Southern Pacific where it crosses?

A. Yes sir.

Q. Can you go on to any of this property without going on this Southern Pacific track?

A. Yes, I think you can from Water street.

Q. That is on a level with the ground at Water street?

A. On a level with the bridge; at Water street there is a bridge that crosses it.

Q. There is a bridge that crosses this elevated roadway?
A. Yes, a bridge that crosses this elevated roadway; comes from Water street, commences at Water street. I would have to look over it to refresh my memory.
Q. As a matter of fact, Mr. Martin, isn't it true that you can't step from that roadway onto any of this property?
A. No, not unless you were very long-legged.
Q. You would have to make a jump to get to it?
A. Yes.

Cross-examination.

Questions by Mr. DUNNIWAY:

Q. But any one can go from any of this property onto the abutting property by going down from the elevated roadway about 15 feet? There is nothing to prevent any one from going from this elevated roadway down about 15 feet to the property?
A. None whatever.
Q. Is there anything to prevent the property-owner from raising the surface by filling the land up to the surface of the elevated roadway?
A. None whatever.

Judge Pipes objects to the question as incompetent, irrelevant and immaterial.

Q. And it is a benefit to the property in its present condition and in any future condition?
A. I believe that there are several warehouses that are on a level with this street. Buffalo Pitts I think fronts on this.
Q. And is it not the ordinary way of using that property to raise the surface of the property with piling or other foundation to put the buildings on a level with the street, with the grade of the elevated roadway?
A. In my opinion it is the only practical way.
Q. Isn't that the way that everybody does with such property?
A. That I am aware of it is.
Q. And isn't it a fact that some of the adjoining abutting property is used in that way?
A. All of it that I know of.
Q. Now, what would you say as to whether or not the building of this roadway would increase the value of this abutting property which is assessed for the improvement of this street? More than the assessment which is levied upon the property to defray the cost of the elevated roadway?
A. I could safely say about 50 %.
Q. The property was raised in value about 50 %?
A. Yes.
Q. And that is more than the cost of the assessment is it not?
A. Yes sir.
Q. Then you would say that the property is benefitted by the

building of this elevated roadway more than the cost of the elevated roadway?

A. Yes sir, I would say so considering.

Q. Will you please state whether or not an elevated roadway isn't the only practical way to put a street through this property and make it valuable for use?

A. The only way that I know of and the only way that has ever been done in Portland that I am aware of and I have had some experience in building elevated roadways.

Q. This is low land lying right in the heart of East Portland isn't it?

A. Yes sir.

Q. And if this street wasn't built upon this grade one under would be parallel at fifteen feet would it not?

A. Well, I can't tell you the depth.

Q. Practically speaking?

A. From 10 to 15 feet.

49 Q. And without this roadway this property is absolutely disconnected with the rest of the city is it not?

A. Without this bridge I don't know how it could be used for anything unless a cow pasture or something of that kind.

Q. Couldn't even get your cows on it without this roadway?

A. Well, they could scramble in from low ground.

Q. They would have to have a street?

A. Yes.

Redirect examination.

Questions by Judge PIPES:

Q. The street is there without the roadway isn't it? There is a street laid out there without a roadway?

A. It is on the street.

Q. Yes, I say the street is out there?

A. I presume there is.

Q. You say this property is increased in value about 50%?

A. That is my opinion. My reason for basing my opinion on that is that I have talked with people who were negotiating to buy that property about two years ago and they have since purchased some and they stated to me that just when that roadway was going in they purchased a piece of property there and they paid 50% more than what was asked for the property two years ago.

Q. Isn't property worth more than it was two years ago, without reference to any roadway?

A. Some is and some ain't.

Q. So that property that you are talking about at present raised in value on account of the roadway?

A. I presume so.

Q. Did they say so?

50 A. Well of course the Buffalo-Pitts building there and opening up this roadway has enhanced the value of all that property.

A. Is it the Buffalo-Pitts you are speaking about?
A. No sir.
Q. Is it along this roadway?
A. It is in that vicinity. I can't locate the lots.
Q. It doesn't lay right along this roadway? It isn't any of the property involved here?
A. I don't know whether it is in that particular portion or not.
Q. But near that?
A. Yes.
Q. But isn't it a fact that property in that vicinity if it is improved by this roadway is improved by reason of the general benefit that the roadway is to the property all around there?
A. I presume that it is to a general extent; the roadway is to a general extent of benefit.
Q. And to all property in that vicinity?
A. No, it would be no benefit to property that you could not get to, that has no available street.
Q. Do you mean to say that this street is no benefit to any property except that which it lays along?
A. Unless cross-streets run through it I don't see how it could.
Q. Suppose cross-streets run through. Here[l is lot 1 and 2 and 7 and 8 which lay north of lots 4 and 5 in block 17. Aren't those lots benefitted generally by this roadway?
A. Does the roadway go by them?
Q. The roadway don't touch them but they are in the same block.
A. Well, some in that block you can't touch.
51 Q. Well, what do you think about this? Does the roadway help the property in the vicinity of it generally?
A. It may be a certain benefit for the amount of business that it brings there.
Q. Now, when you spoke of the appreciation of property in that vicinity, you meant the general appreciation of property by the general benefit that a roadway is?
A. Yes.

Recross-examination.

Questions by Mr. DUNNIWAY:

Q. Didn't you also have reference to the particular benefit to the property laying and abutting on the street?
A. Yes, sir.
Q. In addition to the general benefit?
A. Certainly.
Q. Now, there are other roadways between Union avenue and East Water street besides those on East Yamhill street are there not?
A. Yes.

The COURT: Are they in controversy here?
Mr. DUNNIWAY: No, except on this question of general benefits.

Q. Now, is it not a fact that this property was low and that there

must be elevated roadways in order to make this property accessible or saleable in any way?

A. Yes, sir.

Q. Isn't a large per cent. of it covered with water so that the roadway and buildings must be raised to keep out of the water?

A. Certain seasons of the year I think so. During certain seasons of the year a part of it is always covered.

(Witness excused.)

52 Mr. WM. A. STOREY, called as a witness on behalf of the plaintiffs, and after being duly sworn, testified as follows:

Direct examination.

Questions by Judge PIPES:

Q. Mr. Storey, what official position have you occupied for the past two years in this city?

A. That of councilman and mayor of the city.

Q. Were you a member of the council during the year 1898?

A. I was.

Q. And a member of the street committee?

A. No, sir.

Q. Were you present during the meetings of the council when the proceedings for the improvement of East Yamhill street, referred to in this complaint, were had?

A. Yes, sir.

Q. Do you remember about that improvement?

A. Yes, sir.

Q. Do you know about the property and the improvement?

A. Yes, sir.

Q. You may state what benefit, if any, you found accrued to any of the property affected by these assessments by reason of the improvement.

A. You want I should say what I think in my judgment?

Q. Yes, what you think and what you thought and what was the ground of your opinion that it was benefitted?

A. Why, I went and looked the property over at the request of Mr. Hislop and Mr. Packet and judging from the appearance of the property as I saw it and then judging from what I thought the property would be afterwards by reason of having an outlet, I concluded that the property would be considerably enhanced in value.

Q. You say by reason of its having an outlet?

A. Yes, sir, in the way of a roadway.

53 Q. This roadway is considerably above the level of the property, isn't it?

A. Yes, sir.

Q. Can you get from the roadway to the property?

A. You can by climbing down; by having a ladder.

Q. Do you think that is a good outlet?

A. The outlet would be as the other outlets are made to property built on piling.

Q. Your notion was that if they built piles up and put improvements on it it would be a benefit to that property by reason of that?

A. It made it accessible for warehouse property and such property as that.

Q. That is the ground of your judgment?

A. Yes, sir.

Q. Did you take into consideration the benefit to any particular part of this property, any of these lots, in making the assessments?

A. My opinion was that all property abutting on the street would be benefitted.

Q. Benefitted alike, uniformly or differently?

A. The 100 feet abutting on the street I concluded would be benefitted more than the 100 feet in the lot.

Q. How about two different lots of 100 feet that lay along the roadway touching each other?

A. I think they would probably be a little more benefitted than otherwise because they had more frontage.

Q. I mean to say what is the difference in benefits if anything?

A. That I could not say.

Q. I will finish my question. Was there any difference in benefits between the lots that lay along this roadway, from one
54 end to the other, that abut on it? Isn't there any particular lot that lies next to it and abutting on this roadway?

A. I don't hardly understand you.

Q. Here are lots 4 and 5 that abut on this roadway lay along apparently in the same situation. Can you tell how or why lot 4 is benefitted less than lot 5?

A. No I cannot.

Q. Aren't they benefitted as far as you are able to judge just the same?

A. Well, without the plat I couldn't say because we had the plat to work from and in looking over a piece of property one has to judge from the appearance of it on the plat. Memory don't serve me on the number of the lots.

Q. This property lies along the roadway and varies in its elevation, I suppose, being unlevel. Now, you say that this property is benefitted by reason of its having an outlet. Isn't the outlet to each lot just the same as the outlet to any other——

Mr. Dunniway: I object to this line of questions.

A. No, sir.

Q. In what way does it differ?

A. In the value of the property. A corner lot is more valuable than an inside lot.

Q. I am not speaking of the value but of the outlet. Doesn't each lot have the same outlet by the same roadway?

A. I don't consider it so. I consider a corner lot would be more valuable and even should be assessed more.

Q. So do I. I agree with you. That is not what I am asking
55 you. See if I can make myself understood. I want to know if each particular lot here has not got the same outlet by that roadway.

A. As I understand, yes.

Q. Now, if it is the outlet that creates the benefit, in what way is any particular lot benefitted more than another lot laying along that roadway and abutting on it?

A. Well, I can't see as it would be benefitted any more particularly than another.

Cross-examination.

Questions by Mr. DUNNIWAY:

Q. What, in your opinion, is the amount of benefit to the abutting property by the building of this elevated roadway?

A. Well, if it was mine I should consider it benefitted fully 50 %.

Q. And that is more than the cost of this assessment?

A. Yes sir, that is more than the cost of the assessment.

Q. I understand that you thought the building of this elevated roadway benefitted this land assessed more than the amount of the assessment?

A. Yes sir.

Q. Now, if one of these lots say was only five or ten feet below the elevated roadway and the other was ten to fifteen feet and by reason of the difference in elevation the cost of the elevated roadway was greater for one lot than for the other, as I understand you you say the benefit to each lot was greater than the cost of the most expensive assessments. Is that right? I probably did not make myself clear. Suppose one of these lots is say ten feet below the grade of this elevated roadway and the other is fifteen feet below the grade of the elevated roadway, and by reason of this extra difference in depth it costs more to put the elevated roadway in front of a
56 lot fifteen feet below ground than to put it in front of a lot ten feet below. As I understand you, you think that the benefit to this abutting property is more than the cost of the most expensive building of this elevated roadway; the most expensive assessment?

A. The assessment would be greater, there is no question about it; therefore the benefit would be greater; the benefit would be just that much greater in proportion.

Q. Now, they speak about having to build up on piles to use this land. Cannot this land be used without building on piles?

A. I shouldn't think so. It overflows partially during the year; during a portion of the year.

Q. In fact buildings on such land are usually put on piles?

A. Either that or filled.

Q. And building this elevated roadway is the only way you could use this street is it not?

A. I should judge that would be the only way.

Q. Now, would you say that the largest cost of the assessment in front of any one lot, for instance lot 16, block 8, assessed —. What would you say as to whether or not the benefits derived from that lot and by that lot from this improvement were greater than the cost?

A. Well, I think that all of those lots are benefitted more than the cost. I think there is none of them but what has been benefitted.

Q. And that was your consideration before having made this improvement?

A. Yes. I listened to all the argument.

57 Redirect examination.

Questions by Judge PIPES:

Q. You think that the benefit to a lot is increased by the increased cost of the improvement?

A. Yes sir, to the extent of being less accessible, of being a greater depth away from the roadway, the proposed roadway.

Q. Then the higher the cost the more the benefit?

A. Yes sir, the greater the depth the more it would be benefitted by being brought to a level.

(Witness excused.)

Judge PIPES: I will stipulate that all if these witnesses if called will testify as Mr. Storey has. It will save a whole lot of time.

Defendants refuse to stipulate.

58 Mr. CAMERON, called as a witness on behalf of the plaintiffs after being duly sworn testified as follows:

Direct examination.

Questions by Judge PIPES:

Q. What official position have you occupied, Mr. Cameron, for the last two years?

A. Councilman.

Q. A member of the street committee also?

A. Yes sir.

Q. Did you know about this improvement on East Yamhill street?

A. Yes sir.

Q. You may state how you arrived at the benefits to the property along that roadway in passing on this question. First, let me ask you if you were present in the council when this matter was passed. You can then answer my question.

A. Yes, sir. If I remember right, the street committee, I think, had two meetings over this street and several of the people who were owners of property on that street appeared there.

Q. I do not care to go into that, Mr. Cameron. If you will just say briefly to the court how you arrived at the benefits to this property. What was the basis of your opinion?

A. I will just in a minute. Several of the property-owners there said—(interrupted).

Q. I don't want that, Mr. Cameron.

A. I was simply going to tell you what they said.

Q. I don't want what they said. Answer my question.

A. The reason that the street was put through was that the property-owners along there said that they could not use or reach their property without the street. I think that one of the parties who mentioned that was a representative of the Buffalo-Pitts Company and the street was hurried through on that account.

59 Q. The Buffalo-Pitts wanted it?

A. Yes sir, and some of the other property-owners there. I think Mr. Packet was another.

Q. Mr. Cameron, will you answer my question. You have not answered it. My question was, what was the basis of your opinion that that property was benefitted?

A. Well, I consider that the property without the street was pretty near valueless. I couldn't see how they could reach it without the street.

Q. You think this roadway reaches the property?

A. Well, the Buffalo-Pitts Company built a slanting roadway down there until they came to their property.

Q. It benefitted that company didn't it?

A. Yes.

Q. How does it benefit Mr. Hislop's property?

A. I don't know just where that is located.

Q. 4 and 5 in block 17?

A. On the east side of the track?

Q. I think it is north of the roadway?

A. Well, I don't know, I am sure.

Q. Can you state how Mr. Mann's property was benefitted, that is in block 46?

A. I don't know where that is; if you will tell me the location.

Q. Isn't it a fact that your estimate of the benefits was based generally on the proposition that a roadway along there benefits that vicinity?

A. No sir. It seems to me that the property would be valueless without the street. That is the way that I reached it.

Q. Is that property as it now lies accessible from the roadway?

A. I suppose the same as it would be from Belmont.

60 Q. Now, let us take the block that is midway between the ends of that roadway and let us say that you and I wanted to go to that lot this afternoon and look at it and walk on it. Will we travel on that roadway or not?

A. I don't think so. I think it would be pretty hard to reach the ground without building a roadway down there.

Q. Then is it not a fact that that property is not reached by that roadway any more than it was reached before?

A. Yes sir.

Q. Can you get to it any better now than before that roadway was built?

A. Yes.

Q. How can you now?

A. Why, by the roadway.

Q. You said you could not go there from the roadway this afternoon, didn't you?

A. Well, of course, that would be going so as to reach the bottom.

Q. Yes, reach the property.

A. Of course if it was necessary to put a building there it would be necessary to have the street there.

Q. Then you make your judgment based upon the proposition that a building could be put there on piles on a level with the roadway?

A. Yes sir.

Q. And in that case it would be a benefit to the property?

A. A great benefit.

Q. And that is the ground of your contention?

A. Yes sir.

Cross-examination.

Questions by Mr. DUNNIWAY:

Q. To go to this property this afternoon you would have to take a rowboat wouldn't you? The most of that property is cov-
61 ered about nine months of the year and a block of that property midway between that roadway makes a good pond to row in doesn't it?

A. Yes.

Q. It would also be very easy to walk on that roadway opposite the property there and if one wanted to get down to the water take any means of letting themselves down to the water from the roadway couldn't they?

A. Yes.

Q. Then that property situated as it is can only be used, only be made valuable, by putting a foundation upon it, can it?

A. That is the only way, or to build a stone wall.

Q. And to do that and to get an outlet you must have an elevated roadway in front of it?

A. That is the argument used I think by the members of the street committee. I believe Judge Pipes was present at that time.

Judge PIPES: Yes, I represented the client that was benefitted.

Q. And this elevated roadway is similar in construction, height and grade as other elevated roadways that are used for this purpose in this city?

A. Yes sir, I don't see any difference.

Q. State whether or not in your opinion, the abutting property was benefitted by the erection of this elevated roadway more than the amount of the assessment.

A. The valuation would of course but just how much, Mr. Dunniway, I would not be prepared to say. I think it would equal the assessment because it seems to me that the property would be valueless without the roadway. That is the only way the property would be any good.

62 Q. No way of using the property without this roadway, is there?

A. I don't see how you could, unless you want to go by boat.

Q. Then wouldn't you think that the benefit to the abutting property was equal to the cost of getting the necessary roadway?

A. That is the only way to reach the property. It seems to me whatever it would cost to build the roadway, unless it was expensive.

Q. That is unless the cost is greater than it ought to be?

A. Yes.

Q. You would think the amount of the benefit was at least equal to the amount of the cost?

A. If it was reasonable, yes.

Judge PIPES: I renew my offer to stipulate.

Defendants refuse to stipulate.

63 Mr. GEORGE L. BAKER, called as a witness on behalf of the plaintiff, after being duly sworn testified as follows.

Direct examination.

Questions by Judge PIPES:

Q. Mr. Baker, were you a member of the street committee and the council when this improvement was made?

A. No sir.

Q. You were a member of the council?

A. Yes sir.

Q. You were present when it was made?

A. Yes sir.

Q. Will you state to the court the ground of your opinion where that property was benefitted if you think that it was?

A. Well, the property as I viewed it is down in the low ground that is covered by water and it is impossible to build on the ground without having your structure swept away or flooded and it would be necessary to build a piling to build on to keep the water from flooding your house, therefore it would seem to me that it was necessary to have some way to get to it from the street. You could not drive through there. It would be impossible to take teams or anything else through this low ground without having it built up to keep it away from the water. That is the reason I supported the ordinance.

Cross-examination.

Questions by Mr. DUNNIWAY:

Q. Then isn't it your opinion that the abutting property was benefitted by the building of this elevated roadway more than the cost of the roadway?

A. It would seem to me that the property would be of no value at all if there was not some way of getting to it.

Q. Would not building this elevated roadway giving access to

the property benefit the property equal to the amount of the
64 cost of the roadway?

A. If the property was worth anything at all it would certainly be worth twice as much.

Q. As a member of the council if you didn't think it was worth anything at all you wouldn't have been interested in making the improvement would you?

A. I don't think there would have been any person interested in having the roadway through if it was not of value.

Q. Do you not consider it of more value than this assessment by a great deal?

A. Well, I don't know. I am not very familiar with the method they have of assessing because I am not brought in contact with that portion of the business, but it would seem to me that it would be impossible for anybody to stand an assessment that is if the property was not worth that much.

Q. Owners of property along there wanted it done did they not? Some of these owners who owned this property who were assessed wanted this improvement made?

A. Oh my yes; if the majority of them had not wanted it, it would not have been made; the improvement would not have been made.

Q. Isn't it a rule with the council that they will not vote to put a street improvement through unless they consider that the property will be benefitted by the improvement more than the cost of the improvement?

A. Well, that would stand to reason and common sense. I don't see any other answer to make.

65 Redirect examination.

Questions by Judge PIPES:

Q. Why do you assess one lot more than another that lie right together, similarly situated?

Mr. Dunniway objects to the question on the ground that it is a question of law controlled by the charter, admitted by the pleadings.

Objection overruled.

A. Well, I don't know. I don't see any reason for doing it.

Q. You know it is a fact that every one of these lots is assessed differently don't you?

A. Well that of course—I suppose if a person is familiar with that kind of work, that is making assessments, there must be some reason but I couldn't answer because I do not know.

Q. Don't you know as a matter of fact that the assessments are made absolutely according to the cost in front of the particular lot?

A. Well it would stand to reason. I don't know; I could not answer with intelligence because I am not familiar with it.

Recross-examination.

Questions by Mr. DUNNIWAY:

Q. You are not familiar with the charter provisions governing the manner of making assessments in this city?
A. Well, just slightly.
Q. But you don't have that in your memory?
A. No.

The COURT: This witness isn't a member of the street committee.

66 Q. Then I understand, Mr. Baker, you understand that these assessments are made in accordance with the provisions of the charter and before any street improvement is put through at the cost of the abutting property it is considered whether or not the amount of benefit is equal to the amount of cost?
A. Oh yes.
Q. And if the council thinks that the amount of benefit isn't equal to the amount of cost they do not put it through?
A. Well, I will tell you: the street committee examine most of that kind of work and it comes up to us with their recommendation or objection and we generally pass upon it if we see in our judgment that it is fair and reasonable.

(Witness excused.)

67 Mr. SHOWERS called as a witness on behalf of the plaintiffs after being duly sworn, testified as follows:

Direct examination.

Questions by Judge PIPES:

Q. Mr. Showers, you were on the street committee of the common council and a member of the council in the matter of the improvement of East Yamhill street were you not?
A. Yes sir.
Q. How was that property benefitted by the improvement?
A. It was benefitted by getting access to it that would be all—all I know of.
Q. The roadway is put above the property isn't it?
A. Yes sir.
Q. It gives access to that property you think by reason of the fact that it could be built upon piles to make it level with the roadway?
A. Well, I presume, Judge, that is all the way they could use it. I don't think they could use it any other way.
Q. That is the foundation of your opinion?
A. Yes sir.
Q. If they never did that would it benefit that property?
A. Well, no, if they never done it it would not benefit that part; but probably that would benefit other parts.

Cross-examination.

Questions by Mr. DUNNIWAY:

Q. Would not the elevated roadway there be a benefit to the property by reason of enhancing the value of the property?

Objected to by Judge Pipes on the ground that it is not a proper estimate of benefits.

A. I should say so.

68 Q. What is your opinion as to whether or not this elevated roadway enhanced the value of the abutting property more than the cost of the elevated roadway?

A. Well, I should think so or I would not have supported it.

Q. You thought so prior to having had this improvement made did you?

A. Yes sir.

Q. Then your opinion is now and was then that this elevated roadway would enhance the value of this abutting property and be a direct benefit to it more than the cost of any improvement?

A. I did.

Judge PIPES: I will renew my offer to stipulate.

Mr. LONG: I will make this proposition that the rest of the witnesses will testify that prior to the putting through of this improvement they investigated the matter of cost of the improvement, the situation and location of the property, and that as a result of that investigation and as a matter of fact the making of the improvement enhanced the value of the property that is assessed more than the cost of assessment as made by the common council upon each piece of property.

Judge PIPES: I will have to decline such a liberal proposition.

69 Mr. LUCKEL, called as a witness on behalf of the plaintiffs after being duly sworn testified as follows:

Direct examination.

Questions by Judge PIPES:

Q. You were a member of the street committee when this improvement was made on East Yamhill street?

A. No sir.

Q. Were you a member of the common council?

A. Yes sir.

Q. Now, will you state what the basis of your opinion was that this property was benefitted, if it was benefitted, when you voted for these proceedings?

A. Well, I haven't much opinion myself about it, not being on the street committee and not investigating that street myself. It is always customary that those things are referred to the street committee and if they report favorably after investigating the matter and state why, we vote accordingly.

Q. And you based your opinion solely on their recommendation?
A. On their recommendation.

Cross-examination.

Questions by Mr. DUNNIWAY:

Q. You say you based your action solely upon the recommendation of the street committee?
A. I did in this case, yes sir.
Q. You are not a member of that committee?
A. No sir.
Q. Did you go over and examine this elevated roadway before the ordinance was passed?
A. I did not.

70 Mr. HANSON, called as a witness on behalf of the plaintiffs after being duly sworn testified as follows:

Direct examination.

Questions by Judge PIPES:

Q. You were a member of the street committee when this improvement was made that we are talking about?
A. Yes sir.
Q. What was the basis of your opinion, if you have such an opinion, that the property affected was benefitted by the improvement?
A. Why, from the reason that it was inaccessible without the improvement.
Q. Is it accessible with the improvement?
A. I think so, yes sir.
Q. Can you go onto this property over that roadway?
A. You can go there, yes.
Q. Could you this afternoon walk onto that property by way of that roadway?
A. Yes sir.
Q. How would you do that?
A. You could just walk up there and make one long step.
Q. Down from the roadway onto the property?
A. Yes sir.
Q. That is the only way?
A. That would be the only way.
Q. Then you think that its accessibility by reason of that long step benefits the property?
A. Well, I think this, Judge, do you want me to tell what I think?
Q. Yes, that is it.
A. I think that that property every one will admit is valueless for any purpose without a roadway and the fact of their being a roadway there brings it into the market so that it can be used for something.

71 Q. Is that all?
A. Well, you can ask me another question.

Q. What I want to get at is if you have any reason? Your reason may be a good one but if you have any reason why that property is benefitted particularly by that roadway, how it is accessible you can state it other than what you have stated.

A. Well, all that property as I understand is held for speculation a large part of it; all for sale, and no man will doubt but what it is more saleable and worth a great deal more with the roadway there than it is without it.

Q. Then that is the ground of your opinion?

A. Yes sir.

Q. It makes the property more saleable?

A. Yes sir.

Cross-examination.

Questions by Mr. DUNNIWAY:

Q. Makes the property more valuable, doesn't it?

A. More valuable.

Q. That property is useful for warehouse purposes is it not?

A. It has been conceded that is all it was good for.

Q. And it is useful for any purposes which any property below grade in the heart of the city is good for?

A. Yes sir.

Q. And that property is now covered with water is it not?

A. Part of it is, yes sir.

Q. The grade upon which this East Yamhill street was made makes an accessible grade for streets across that property does it not and the property that is in use in that neighborhood is made upon that grade is it not?

A. Yes sir.

Q. What is your opinion as to whether or not the building of this elevated roadway enhanced the value to the direct benefit of the abutting property more than the cost of the assessment of the elevated roadway?

A. We think it has.

72 Q. And is this property not also increased in value by reason of the building of this elevated roadway more than the assessment of the property for the elevated roadway?

A. I think so.

(Witness excused.)

It is stipulated in open court by the parties hereto that the plaintiffs will swear if produced in court that they and each of them did not have any notice or knowledge of the amount of the assessments before the assessments were made or before the same were entered in the docket of city liens or before said work was fully completed by said contractors other than as stated in the complaint and the proceedings therein set forth.

73 Judge PIPES called as a witness on behalf of the plaintiffs and after being duly sworn testified as follows:

Direct examination.

Questions by Judge PIPES:

Q. You may state whether or not you examined the proceedings concerning the improvement of East Yamhill street in the record of the city council before this suit was commenced?

A. I did.

Q. You may state whether or not there is any report on file in the said proceedings by the city engineer of the estimate of the probable cost of said improvement?

Objected to by Mr. Dunniway on the ground that it is immaterial, irrelevant and incompetent.

Objection overruled. Exception allowed.

A. I searched the proceedings and found no such report on record.

Q. You may state whether in the proceedings there was any record of the estimate of the probable cost of the said improvement other than as stated in the complaint?

Same objection. Same ruling.

A. There was not. The complaint states the whole proceedings concerning that subject.

Q. You may state whether there was any record in those proceedings of any notice of the said probable cost other than as stated in the complaint?

A. There was no such notice.

Q. You may state whether there was any record of a hearing before said council or notice of a hearing in the proceedings?

A. There was none.

(Witness excused.)

Plaintiffs rest.

74 *Defendants' Case.*

Mr. RUSSELL, called as a witness on behalf of the defendants after being duly sworn, testified as follows:

Direct examination.

Questions by Mr. DUNNIWAY:

Q. What is your occupation please, Mr. Russell?

A. Real-estate broker.

Q. How long have you been a real-estate broker in this city?

A. About thirteen years.

Q. During that time have you had any occasion to study the price of property on the east side of the river between Water street and Union avenue?

A. Yes, sir.

Q. And you have been handling property in that vicinity?
A. Yes, sir.
Q. And were you so acquainted with the price of property there prior to 1898?
A. Yes.
Q. Since that time?
A. Yes, sir.
Q. Are you acquainted with East Yamhill street between East Water and Union avenue?
A. Yes, sir.
Q. The elevated roadway that was built there?
A. Yes, sir.
Q. Were you acquainted with the property prior to the building of the elevated roadway?
A. Yes, sir.
Q. Acquainted with it since?
A. Yes, sir.
Q. Will you please state what is your opinion as to whether or not the property abutting upon that street was enhanced in value and directly benefitted by the building of that elevated roadway equal to the amount of the cost of the elevated roadway?
A. I should state that the property was greatly benefitted by the improvement.
75 Q. And what would you say as to the amount of that benefit as to being equal to the cost of the roadway?
A. I should say it was worth a great deal more than the cost of the improvement.

Cross-examination.

Questions by Judge PIPES:

Q. In what way was it benefitted?
A. Why, because it gives access to the property.
Q. Could you go down to Mr. Hislop's property this afternoon? Could we go to it by that roadway?
A. Well, you could get a good deal nearer to it than you could before.
Q. But you could not get to it?
A. Pretty near.
Q. For what purpose?
A. Well, supposing you wanted to store a lot of stuff or something in there, planks or something like that, all you would have to do would be to throw them off the wagon on to this property. You could drive the wagon on the roadway and throw things over.
Q. And you could get to it that way?
A. Yes.
Q. This property lies low under that roadway does it?
A. Yes, it varies from one end to the other.
Q. It is not used—there is no warehouses on it or anything of that kind?
A. Well, the Buffalo-Pitts warehouse is on it.

Q. That is at the other end of it?
A. That is on First street; First and Yamhill.

76 Redirect examination.

Questions by Mr. DUNNIWAY:

Q. That property is valu-e by reason of its prospective value for use as warehouse property and other similar purposes, isn't it?
A. Yes sir.
Q. That which is used is used for purposes of warehouse isn't it?
A. Yes.
Q. And is it possible to use that property in any beneficial way without an elevated roadway being built in front of it?
A. No, I don't think it would be.
Q. And what would you think as to an elevated roadway increasing or decreasing the value of such property?
A. Well any roadway in front of any property similarly situated would be a great benefit.

77 Mr. W. F. WHITE, called as a witness on behalf of the defendants, after being duly sworn, testified as follows:

Direct examination.

Questions by Mr. DUNNIWAY:

Q. What is your business, Mr. White?
A. Real-estate broker.
Q. How long have you been a real-estate broker?
A. Seven or eight years.
Q. Are you acquainted with the property on the east side of the river?
A. Yes sir.
Q. Between Water street and Union avenue?
A. Yes sir.
Q. Are you acquainted with East Yamhill street?
A. Yes sir.
Q. Were you acquainted with it prior to 1898, prior to the building of this elevated roadway?
A. I was.
Q. Acquainted with it since?
A. Yes sir.
Q. Have you examined the assessment on that street?
A. I haven't.
Q. The assessment on that street, on that elevated roadway, varies from lots abutting directly on the street from $334 to $501.42. What would you say as to whether or not that property, any of it, was benefitted by the erection of that elevated roadway, equal to the amount of the highest assessment made against it for the elevated roadway?
A. Well, I should say that it would have been benefitted in excess of that assessment for the reason that I know I tried to sell half a block there to a wholesale house here in town for warehouse pur-

poses and couldn't sell it because there was no way to get to it; it was inaccessible.

Q. Of no salvable value without a roadway?

A. No sir.

78 Q. And after the roadway was there what was the affect on this value of the property?

A. It can be sold now.

Q. For largely increased prices than what it could have been sold?

A. I think so.

Cross-examination.

Questions by Judge PIPES:

Q. You say you sold some of this property involved in this case?

A. No, I could not sell it.

Q. Who was it?

A. Lang & Company.

Q. Is it property included in this improvement?

A. I think it was some property belonging to W. K. Smith?

Q. Was it included in this improvement?

A. I think it is.

Q. What is the number of the lot and block?

A. I can't remember the number of the lot and block now. I think W. K. Smith owned three of the lots.

(COURT:)

Q. It was to Lang & Company you were to sell?

A. I was dealing with them, yes, sir. There was no roadway at that time and they could use it.

Q. You mean that was some of the property that was assessed for this improvement?

A. I am saying that I could not sell the property there because there was no street.

Q. Then you are not speaking of a lot on this street?

A. Is W. K. Smith's property on this street?

79 Q. I will read you the list. (Reads list to witness) That is all there are here and it is not included in blocks 17, 56, 67, 56 or 16; those are the blocks. Now you are not talking about any of that property?

A. It must be the adjacent block then.

Q. Somewhere close by?

A. Yamhill street was not put through at that time; no streets anywhere. That was the reason they wouldn't buy it because there was no way to get to the property.

Q. You can go on to that property from that roadway?

A. If the Smith property is not on there you can't go on it.

Q. You can't get on any of this property from the street?

A. This low ground has got to be built up to bring it up to grade.

Q. That is your opinion about that?

A. Yes sir.
Q. It is property similarly situated that you speak about?
A. If it isn't in that block it must be in the next block.
Q. Similarly situated?
A. Exactly situated.

(Witness excused.)

80 Mr. I. HUMASON, called as a witness on behalf of the defendants, after being duly sworn testified as follows:

Direct examination.

Questions by Mr. DUNNIWAY:

Q. Mr. Humason, I believe you own some property, or are interested in some property, south of the Buffalo-Pitts property over in East Portland, are you not?
A. Yes sir.
Q. How long have you been interested in that property?
A. About a year.
Q. The property that you own there has no elevated roadway built to it has it?
A. No sir.
Q. Have you considered the question as to whether or not property situated as that is is benefitted by the building of an elevated roadway?
A. Yes sir.
Q. Are you familiar with East Yamhill street and the property abutting upon it?
A. Yes sir.
Q. Are you familiar with this elevated roadway, this piece of street in controversy here?
A. Yes sir, I have been over it.
Q. What is your opinion as to whether or not the property situated as that is is benefitted by the building of an elevated roadway and is enhanced in value by the building of such an elevated roadway more than the amount of the assessment for such improvement?
A. I think it is greatly enhanced because the property is practically valueless without the elevated roadway.
Q. Now, the greatest assessment on a lot with 100 feet front abutting on East Yamhill street, between East Water and Union avenue, is $501.42. What would you say as to whether or
81 not the benefit derived by that lot from the building of that roadway was equal to that assessment?
A. I think it is fully equal and any lots that haven't the elevated roadway on the west side as that has it is enhanced to a greater extent because they could get out on Water street in that case but there is no way to get at the lots back in the middle of the field unless they have this roadway to build to.

Cross-examination.

Questions by Judge PIPES:

Q. That lot counsel asked you about is lot 8, block 16?
A. You have got me. I don't know the exact location of it.
Q. It is a corner lot.
A. On East Yamhill and what street?
Q. It is on East Yamhill street and abuts 100 feet on East Yamhill street along that elevated roadway.
A. Near Water street did you say?
Mr. DUNNIWAY: I didn't specify. It is Lesmonds and must be west of the Southern Pacific railroad on the south side of the street.
A. If it is a corner lot on Water street it is—well, I would imagine from what we paid for our piece that that lot was worth about $2,000.
Q. Before the roadway was made?
A. No, as it is now.
Q. What was it worth before the roadway was put there?
A. Well, I should imagine from $1,100 to $1,200. I am speaking if it is a corner lot on East Yamhill and East Water.
Q. And you think it has enhanced to be worth $2,000 now?
A. Yes.
Q. Is it used any different from what it was before?
82 A. Well, it can be used different.
Q. In what way?
A. Well, they have a different frontage. They can get out on both sides.
Q. It can be built on and raised up?
A. Yes, that is the only way that property can be used. It is only fit for cow pasture as it is.
Q. It could be used as a cow pasture?
A. Yes, when the water is off.
Q. It isn't used for any purpose now except as a common?
A. You mean as a body there, the whole body?
Q. Yes, it is all in the common?
A. Yes.
Q. It is not enclosed?
A. No.
A. Nor improved?
A. No.
Q. And lies there along the roadway?
A. Yes sir.

Redirect examination.

Questions by Mr. DUNNIWAY:

Q. This property lies between the river front and the property back of it is built on higher ground?
A. Yes.

Q. And therefore when the streets are put through it becomes valuable?

A. Yes sir.

(Witness excused.)

83 Mr. LONG, called as a witness on behalf of the defendants, after being duly sworn, testified as follows:

Direct examination.

Questions by Mr. DUNNIWAY:

Q. What is your official position?

A. City attorney and after October 22, 1898, I became a member of the board of public works of this city.

Q. What, if any, estimates and specifications of cost were made before and during the progress of the improvement of East Yamhill street from East Water to Union avenue?

Objected to by Judges Pipes on the ground that if it was made it should be in writing and the writing is the best evidence. The record itself is the best evidence.

Mr. DUNNIWAY: We objected upon incompetency upon Judge Pipes' testimony. We thought we would offset that.

A. When the board first came into existence the very first thing required was that Mr. Chase should comply with the provisions of the charter which required him to make an estimate of the cost of an improvement and in every instance the board has required it and in no case has the board ever allowed a contract or allowed a petition without Mr. Chase's estimate. I am positive of this in every case because that is one of the points I have particularly looked after, that when the estimates were over 10 % or 15 % above the estimate of cost by Mr. Chase it would be turned down. I never examined the records since to see what has become of the papers. I know they were always at the board, at its meetings. There was a serious fight regarding this improvement on East Yamhill street and I was exceedingly careful to examine the record myself
84 and see that everything was done correctly as I feared that there was going to be a lawsuit.

Cross-examination.

Questions by Judge PIPES:

Q. Was that estimate that Mr. Chase made, made at the same time or on the same paper that his estimate of the material was made?

A. I think not. Mr. Chase used to make an estimate of material and an estimate of cost of the improvement of the street. This estimate of cost was of course an estimate by divisions, don't you see, in which it would show the cost of the different parts of a street.

Q. When was the estimate of the cost of this elevated structure made and reported to the board of public works?

A. The estimate was made November 16th, 1898.

Q. What was the estimate in this case?

A. I could not tell you exactly, I can tell you pretty near what the estimate was. I think there was about 16 % difference, if I remember, between his estimate and the contract price as offered, if not a little bit more. I remember now there was a raise in lumber at that time which we had to consider.

Q. Was that before the board of public works or before the council?

A. The board of public works. I don't know anything about the council. I don't have anything to do with that.

Q. Now, under the charter, does that estimate have to go before the board of public works or the common council?

A. The city engineer makes his estimate and I suppose it has to go before both. The clerk of the public works is the clerk for both.

85 Q. Have you examined the record of the common council to see whether such an estimate has ever been made to the common council?

A. An estimate presented to the common council?

Q. Yes sir.

A. It was certainly filed with Mr. Gambell, the city auditor and the clerk of the common council and the clerk of the board of public works.

Q. So you haven't examined that record then?

A. Not since we let the contract I haven't.

Q. Then what you state is from recollection?

A. No sir; no contract has ever been let since the board of works came into existence unless Mr. Chase furnished a correct estimate of cost and that was filed with the clerk.

Q Will you kindly, Mr. Long, make an examination for the benefit of the court and produce that estimate?

A. I will if I can find it. I know it was there.

COURT: It may be produced hereafter or accounted for.

A. I will say that I haven't examined since to see but I know it was filed at that time.

COURT: Judge Pipes has asked Mr. Long if he will produce it and put it in as part of his testimony.

86 Office of the city engineer.

Specifications for elevated roadway on East Yamhill street from the west line of Union avenue to the east line of East First street and from the west line of East First street to the connection with the elevated roadway of East Water street.

To whom it may concern:

The elevated plank roadways on East Yamhill street from the west line of Union avenue to the east line of East First street and from the west line of East First street to a connection with the elevated roadway of East Water street, shall be constructed and com-

pleted in accordance with the plan herewith filed and marked "Plan for elevated roadways on East Yamhill St. from the west line of Union avenue to the east line of East First St. and from the west line of East First St. to a connection with the elevated roadway of East Water street," and the requirements hereinafter set forth.

The roadway will be supported on pile bents placed as follows: One bent at the west line of Union avenue, one bent at the east line of East First street, and the intermediate bents will be placed twenty (20) feet apart from center to center. Also one bent to be placed at the west line of East First street, one bent eleven (11) feet west of the east line of East Water street, one bent at the east line of East Water street and the intermediate bents twenty (20) feet apart from center to center.

All bents shall consist of seven piles each surmounted by a 10″ x 12″ cap forty (40) feet long, laid with the narrow side down.

All piles used in the construction of these roadways shall be of the best quality of red or yellow fir, straight, peeled, free from rot and large knots and shall be of sufficient length to be cut below all splits and splintering and reach to a level 2′–6″ below the established grade.

87 Each pile shall be driven until a solid foundation is reached and to the satisfaction of the city engineer. If considered practicable by the city engineer, each pile must be driven at least twenty feet into the ground. No pile shall be used if less than twelve inches in diameter at small end. Every pile shall be ringed with a wrought-iron ring when necessary to prevent splitting or crushing when driven and shall be driven perpendicularly and as shown on plan. The top of each pile must be chamfered so as to be no wider on top than the cap which rests upon it.

Each cap shall be secured to every pile under it with one ¾-inch drift-bolt 22 inches long set through cap and driven at least ten inches into the pile. In the elevated roadways between East Water St. and the east line of E. Second St. each cap shall also be secured to each pile by one wrought-iron strap 18″ long 1½″ wide and ¼″ thick, placed on alternate sides of the cap; each strap to be fastened to both pile and cap with four boat spikes ⅝″ x 5″.

The roadway shall be constructed as shown on plan, with sixteen 4″ x 14″ joists set up edgewise. No joist except at the end spans and outside courses shall be less than forty-one feet in length. The outside courses of joists on either side of the roadway shall be forty feet long, or the length of two spans of the trestle and have butt joints. The intermediate courses shall be so laid as to lap ends and have a bearing the full width of the caps and so laid as to break joints.

The outside courses shall be notched down two inches, the middle joists shall be left full and the intermediate ones being notched so as to give a regular crown to the floor. At the street intersections this crown shall be omitted, and the joists outside nearest the intersection shall be notched down so as to gradually form the required crown for the rest of the roadway. Joists shall be placed equidistant

apart, as shown on plan, and shall be secured to each cap with two heavy 7″ wire spikes at each bearing and in the same manner to each other where they lap, and each joist all be so notched as to have a full bearing across the top of the p. In the elevated roadway between E. Water street and the east ne of E. Second street the 1st, 4th and 7th courses of joists from ch side of the roadway shall also be secured to the cap by a rought-iron strap 18″ long, 1½″ wide and ¼″ thick with a ¼ twist the middle so as to fit flat against both joist and cap; each strap be fastened to joist and cap with four boat spikes ⅜ x 5.

The floor of the roadway will consist of 4″ x 12″ plank 36 feet ng, laid at right angles to the street. Every plank shall be secured each joist with two 7″ wire spikes at end bearing and one such ike at intermediate bearing, driven at alternate sides of the plank nd all spikes shall be driven ¼ of an inch below the top surface of he plank and no spike shall be driven at an angle exceeding 20 egrees from perpendicular.

The sidewalks shall be twelve feet wide on each side of the road- ay and be supported by six joists each 4″ x 12″ placed equidistant part, supported on supercaps 10″ x 10″.

The supercaps shall be secured to the caps with one ½-inch bolt, passing through both cap and supercap and the bolt shall have head and nut and wrought-iron washers.

The joists next to the curb and street lines shall be at full length of two spans and have butt joints. The intermediate joists shall be sufficient in length to reach over two spans and lap by each other one foot, so placed as to break joints with the adjacent courses. Each joist shall be spiked to each cap with two 7″ wire spikes at each bearing and in the same manner to each other, where they lap. Two joists of the sidewalk in the elevated roadway between E. Water St. and the east line of E. Second St. to be designated by the city engineer during construction, shall also be secured to each supercap by a wrought-iron strap 18″ long, 1½″ wide and ¼″ thick
89 with a ¼ twist at the middle so as to fit flat against both joists and supercaps; each strap to be fastened with four boat spikes ⅜″ x 5″.

The pile supporting the sidewalk, shall be cut so as to give the finished sidewalk a fall of one inch toward the roadway. The joists next to the curb shall be laid two inches away from the ends of the roadway plank. The floor of the sidewalk will consist of 2″ x 8″ plank 12 feet long, surfaced on one side, and laid at right angles to the line of the street. Each plank will be secured to each joist with two 30ᵈ wire nails at end bearing and on such nail at intermediate bearings driven at alternate sides of the plank. At the middle of each span and over each bent where a guard-fence is to be constructed, two covering planks of the sidewalk shall be fourteen feet long for sustaining the guard-fence.

The sidewalk guard-fence shall consist of 4″ x 4″ rail supported every ten feet by a 4″ x 4″ post, one post to be set over each cap and midway of each span; each post will be secured to the outer joist of the sidewalk with a ½-inch bolt with head and nut and washers, the

bolt to extend through the post and outer joist. All such posts will be braced from the extended sidewalk plank with 2″ x 4″ braces, well spiked at top and bottom. The line of the rail will be unbroken and the top corners beveled. The ends of the rail will be connected by mitered joints secured to each post with one heavy seven-inch wire spike and holes will be bored for the purpose. Between the rail and floor of the sidewalk three boards 1½″ x 6″ shall be securely nailed to the posts with two 12ᵈ nails at each bearing. The top of the hand rail will be four feet above the sidewalk.

The rails, posts, braces and boards of the guard-fences will be dressed on all sides.

No guard-fence will be constructed except where shown and marked on plan.

Sway braces 3″ x 10″ shall be secured to this structure with
90 one ¾″ screw-bolt at the end bearings and with two 7″ wire nails at each intermediate bearing as shown on plan.

All bolts and nuts in this structure shall be of wrought iron and all bolts, except drift-bolts, shall have head and nut and screw end. All washers for bolts must be of wrought iron four times the diameter of the bolt.

All timbers used in this structure must be of the best quality of red or yellow fir, sound and free from sap portions of the timber and free from large, loose or dry knots, shakes, veins, pitch seams or other imperfections.

This entire structure and all its parts shall be constructed in a first-class workmanlike manner and to the satisfaction of the city engineer.

All obstructions shall be removed by and at the expense of the contractor.

When the work of constructing these elevated roadways is once begun, the contractor shall pursue the work of construction of the same with energy and without delay.

The city engineer shall have the right to vary from these specifications, or extend or diminish the quantity of the work, but the contractor shall not vary therefrom unless so ordered by the city engineer.

The contractor shall take entire charge of the work during its progress and shall be responsible for and loss or damage occasioned by his carelessness or neglect. He shall protect all gas, water, and sewer mains and other fixtures from injury which might result during the construction of the roadway. Also, when required, to prevent accident or injury to persons or property, he shall erect and keep erected a fence or railing across the ends of these roadways and place red lights sufficiently near the work as a signal of danger, the same to be kept burning during the night.

All requirements that may be fairly inferred from these specifications, in order to make a first-class job of the work, shall be
91 as binding on the contractor as if particularly specified.

WILLIAM B. CHASE,
City Engineer.

Portland, Oregon, November 16th, 1898.

STATE OF OREGON, } ss:
County of Multnomah, City of Portland, }

I, A. N. Gambell, auditor of the city of Portland, do hereby certify that I have compared the foregoing copy of specifications for elevated roadway on East Yamhill street, from the west line of Union avenue to the east line of East First street, and from the west line of East First street to a connection with the elevated roadway of East Water street with the original thereof, and that the same is a full, true, and correct transcript of such original specifications and of the whole thereof, as the same appears on file and of record in my office, and in my care and custody.

In witness whereof, I have hereunto set my hand and the seal of the city of Portland affixed this 22nd day of December, 1899.

A. N. GAMBELL,
Auditor of the City of Portland,
By T. C. DEVLIN, *Deputy.*

[Seal of City of Portland.]

Indorsed: "Specifications for elevated roadways on East Yamhill street from the west line of Union avenue to the east line of E. First St. and from the west line of E. First St. to a connection with the elevated roadway on E. Water St. Filed November 16, 1898. A. N. Gambell, auditor, by S. Grutze, deputy."

92 STATE OF OREGON, } ss:
County of Multnomah, }

I, John B. Cleland, judge of the circuit court of Multnomah county, State of Oregon, department No. 3, hereby certify to and identify the foregoing record as all the evidence consisting of the testimony of the witnesses, documentary evidence, and exhibits in the said cause of A. N. King *et al.*, plaintiff-, *vs.* The City of Portland *et al.*, defendant-.

JOHN B. CLELAND, *Judge.*

STATE OF OREGON, } ss:
County of Multnomah, }

I, J. P. Kennedy, clerk of the circuit court of the State of Oregon, for the county of Multnomah, do hereby certify that the foregoing testimony and exhibits constitute all the evidence heard or offered to be heard at the trial of a cause in the circuit court of the State of Oregon, for Multnomah county, wherein A. N. King *et al.*, — plaintiff- and The City of Portland *et al.*, defendant-.

Witness my hand and the seal of said court this 6th day of July, 1900.

[Circuit Court Seal.]

J. P. KENNEDY, *Clerk,*
By LANSING STOUT, *Deputy.*

Indorsed: "King *v.* Portland. Transcript. Filed Jul- 20, 1900, J. J. Murphy, clerk, by J. W. Reeves, deputy."

93 In the Supreme Court of the State of Oregon, March Term, 1900.

A. N. KING, P. J. MANN, A. S. NICHOLS, THE MULTNOMAH INVESTment Company, a Corporation, and Fred N. Pendleton, Plaintiffs and Appellants,

vs.

THE CITY OF PORTLAND, THE BOARD OF PUBLIC WORKS, THE Common Council of said City, D. H. McLauchlan, Chief of Police; A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works, and M. W. Lind and Joseph M. Manning, Partners Doing Business under the Firm Name of Lind & Manning, Defendants and Respondents.

Appeal from the judgement and decree of the circuit court for Multnomah county, Hon. John B. Cleland, judge.

Appellants' Brief.

Pipes & Tifft, attorneys for appellants.
J. M. Long and R. R. Dunniway, attorneys for respondents.

Filed Oct. 1, 1900 J. J. MURPHY, *Clerk*,
By J. W. REEVES, *Deputy*.

94 In the Supreme Court of the State of Oregon, March Term, 1900.

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vs.

THE CITY OF PORTLAND, THE BOARD OF PUBLIC WORKS, THE Common Council of said City, D. H. McLauchlan, Chief of Police; A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works, and M. W. Lind and Joseph M. Manning, Partners Doing Business under the Firm Name of Lind & Manning, Defendants and Respondents.

Appeal from the judgement and decree of the circuit court for Multnomah county, Hon. John B. Cleland, judge.

Appellants' Brief.

1. The rule of assessment that places the whole burden upon particular property, without apportionment, is not taxation, but taking property without compensation for public use.

95 Thomas *v.* Gain, 35 Mich. 154.
Village of Norwood *v.* Baker, 19 Sup. Ct. 192.
Agens *v.* Mayor, 37 N. J. Law, 416.
Tidewater Co. *v.* Coster, 18 N. J. Eq. 519.
Matter of Canal St., 11 Wendall, 154.
Cooley on Taxation, 453–454.
Cooley's Const. Lim., 3rd ed., p. 508.
Hutcheson *v.* Storrie, 45 L. R. A. 289; S. C. Tex.
City of Seattle *v.* Yesler, 1 Wash. Ter. 571.
Dexter *v.* Boston, 57 N. E. Rep. 379.

2. A rule of assessment that charges each lot with the cost of the improvement in front of it is void.

Village of Norwood *v.* Baker, 172 U. S. 269; S. C. 19 Sup. Ct. Rep. 187.
Motz *v.* Detroit, 18 Mich. 495.
Davis *v.* Litchfield, 21 L. R. A. 563, note; S. C. 145 Ill. 313.
96 Cooley on Taxation, 453, 454.
Cooley's Const. Lim., 3rd ed., p. 508.
Burrough's Taxation, 465, note 5.
Woodbridge *v.* City of Detroit.
Christiancy, J., 8 Mich. 301, 304.
People *v.* Lynch, 51 Cal. 23.
Chicago *v.* Larned, 34 Ill. 203.
Ill. Cent. R. R. Co. *v.* Bloomington, 76 Ill. 447.
City of New Whatcom *v.* Bellingham Bay Co. 38 P. 163; S. C. Wash.
State *v.* Jersey City, 37 N. J. L. 129.
St. John *v.* City of E. St. Louis, 50 Ill. 92.
Hutcheson *v.* Storrie, 45 L. R. A. 289.

3. A rule of assessment is void that is not based upon benefits to the property assessed, and the assessment limited to the benefits.

Bonds of Madeira Dist., 14 L. R. A. 755, note.
Village of Norwood *v.* Baker, 172 U. S. 269; S. C. 19 Sup. Ct. 187.
McKee *vs.* Pendleton, Baker, C. J. concurring, 57 N. E. Rep. 532.
Kerston *v.* McGoonkie, 48 L. R. A. 851.
Norfolk *v.* Tonny, 97 Va. 728, 47 L. R. A. 374.
97 Mobile Co. *v.* Kimball, 102 U. S. 691–703–704.
Railroad Co. *v.* Decatur, 147 U. S. 190, 202; S. C. 13 Sup. Ct. 293.
Hutcheson *v.* Storrie, 45 L. R. A. 289.
Bauman *v.* Ross, 167 U. S. 548–589; S. C. 17 Sup. Ct. 966.
Masters *v.* City of Portland, 24 Or. 167.
City of Bloomington *v.* C. & R. R. Co., 134 Ill. 458.
Town of Elma *v.* Carney, 37 P. 709; S. C. Wash.
Alleghany City *v.* West. R'y Co., 138 Pa. 375.
Ill. Cent. R. R. Co. *v.* Bloomington, 76 Ill. 447.
Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255; S. C. 4 Am. Rep. 63.
Hammett *v.* Phil., 65 Pa. 146; S. C. 3 Am. Rep. 615.
Chicago *v.* Larned, 34 Ill. 279.
98 Tidewater *v.* Coster, 18 N. J. Eq. 518; S. C. 90 Am. Dec. 634.
Wilson *v.* City of Salem, 24 Or. 512.
Meier *v.* Kelly, 20 Or. 96.
Paulson *v.* City of Portland, 16 Or. 450–460.
Or. & C. R. R. Co. *v.* City of Portland, 25 Or. 229.
Charles *v.* The City of Marion, 98 Fed. Rep. 166.
Lyon *v.* Tonawanda, 98 Fed. Rep. 361.
Fay *v.* City of Springfield, 94 Fed. Rep. 409.
Hutcheson *v.* Storrie, 45 L. R. A. 289; S. C. Tex.

4. The benefits must be special—that is, must make the property more accessible or more enjoyable in its use and do not include benefits common to the community nor those merely speculative.

Tidewater Company *v.* Coster, 18 N. J. Eq. 518.
N. Y. R. R. Co. *v.* New Haven, 42 Conn. 279.
State *v.* Elizabeth, 40 N. J. L. 274.
State *v.* Elizabeth, 37 N. J. L. 330.
City of Boston *v.* Shaw, 42 Mass. 130.

99 5. Property that from its physical situation cannot be benefited cannot be assessed for improvements, and the courts will inquire into and decide this question.

Or. & C. R. R. Co. *v.* City of Portland, 25 Or. 229.
City of Bloomington *v.* C. & A. R. R. Co., 134 Ill. 458.
Alleghany City *v.* Western R'y Co., 138 Pa. 375.
State *v.* Elizabeth, 37 N. J. L. 330.

6. The owner must have notice and an opportunity to contest the amount of his assessment and the extent of his benefits.

Paulson *v.* City of Portland, 149 U. S. 30; S. C. 13 Sup. Ct. 753.
Tidewater Co. *v.* Coster, 18 N. J. Eq. 519.
Philadelphia *v.* Miller, 49 Pa. St. 440–448.
Butler *v.* Supervisors, 26 Mich. 22.
Wilson *v.* City of Salem, 24 Or. 509.
Cook *v.* City of Portland, 58 P. 353.
Norfolk *vs.* Young, 97 Va. 728; S. C. 47 L. R. A. 574.

100 Charter of Portland, sec. 123, Sess. Laws 1891, 829.

Statement of the Case.

The authorities of the city of Portland in this case attempt to assess the property in question for the improvement described, which consists in constructing an elevated plank roadway above the property, but which does not afford access to the property, all in accordance with the present charter of the city of Portland. [But in one essential particular the charter was not followed.]* The probable cost of making the improvement and the entry thereof in the city lien docket was not made before the contract was let or before the work was done, but after the work was fully completed. The complaint is a sufficient statement of the proceedings that were taken.

The question here presented is whether the method provided by the charter is in conflict with the constitution of the United States and of the State of Oregon.

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* [Written in pencil on margin:] This is error and was taken from another brief.

[Words enclosed in brackets erased in copy.]

Argument.

I.

Our first proposition is that the charter of the city of Port-
101 land, under which this improvement was made, is in conflict with the constitution of the State and of the United States. It is in conflict with the constitution of the State, article I, section 18; article I, section 10; article IX, section 1; article I, section 32, and with the 14th amendment of the Constitution of the United States in that it provided for taking plaintiff's property without due process of law.

The first specific objection we make is, that the method of assessment adopted in the charter is not taxation, but is the taking of private property for public use. The charter requires the council to assess the costs of improvements or repairs of a street upon the half street immediately in front of the lot to be assessed. It does not authorize the council to exercise any discretion in making the assessments, or to apportion the taxes amongst the owners of the property to be affected. Mr. Cooley calls this method spoliation. The legislature has no power, under the guise of taxation, to take away a man's property, without paying him for it. It is the taxing power that is not limited, and not the power to call things taxation which are not taxation. Taxation has certain definite elements, without which it does not exist. For instance, taxation involves the idea of a public purpose to be subserved. If one man's property is taken away from him and given to another this is not taxation. In the next place,
taxation implies the idea of a community of burden. One
102 man cannot be taxed alone. It is true that the city may be divided into taxation districts, and taxes raised in the district for purposes common to that district, but when this subdivision is carried to the extent of making a man's property the taxing district and the man himself the community to be taxed, the very nature of taxation is departed from.

Upon this question the supreme court of New Jersey is quoted approvingly in the case of

The Village of Norwood *v.* Baker.

in this language: "But while it is thus clear that the burthen of a particular tax may be placed exclusively on any political district to whose benefit such tax is to inure, it seems to me it is equally clear that when such burthen is sought to be imposed on particular lands not in themselves constituting a political subdivison of the State, we at once approach the line which is the boundary between acts of taxation and acts of confiscation. I think it impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation is not a limited right, for it would seem much more in accordance with correct theory to maintain that the power of selection of the property to be taxed cannot be contracted to narrower bounds than the political district within which it is to operate, than that such power is entirely illimitable."

103 Agens *v.* Mayor, 37 N. J. L. 416, 420, 423.

Taxation implies justice and equality; that is to say, exact equality of taxation between individuals may not be necessary, but the taxes to be raised must be laid upon the individuals in the community in some just proportion as between themselves, so that the burden may rest with some degree of equality upon every member. If all or any of these elements are lacking, then the legislature has not exercised the power of taxation, but some other power. Applying this to the case at bar, it is apparent that the whole amount of the taxes necessary for the improvement is not divided amongst the owners of the property in any proportion whatever. The method is to tax each lot with a specific sum, that has no relation to the taxes upon any other property in the district. There is no community of burden in apportionment, and the taxing district is each particular piece of property taxed. It makes no difference that a number of persons are taxed in the same proceeding and in a similar manner. That does not make it a community burden, nor does it make any difference that the whole tax is levied upon all the property in the district. The fact is that the whole tax is found by adding together the taxes of each individual lot, and the tax on each individual lot is not found by dividing the whole tax
104 upon any basis of apportionment whatever. No man's assessment has any relation to any other man's assessment, and is neither increased nor diminished by that of his neighbor.

We quote upon this subject from Mr. Cooley: "But a very different case is presented, when the legislature undertakes to provide that each lot upon a street shall pay the whole expense of grading and paving the street along its front. For, while in such a case there would be something having the outward appearance of apportionment, it requires but slight examination to discover that it is a semblance only, and that the measure of equality, which the Constitution requires, is entirely wanting. If every lot-owner is compelled to construct the street in front of his lot, his tax is neither increased nor diminished by the assessment upon his neighbors; nothing is divided or apportioned between them; and each particular lot is in fact arbitrarily made a taxing district, and charged with the whole expenditure therein, and thus apportionment avoided. If the tax were for grading the street, simply, those lots which were already at the established grade would escape altogether; while those on either side, which chance to be above or below must bear the whole burden, though no more benefited by the improvement than the others. It is evident, therefore, that a law for making assessments on this basis could not have in view such distribution of burdens in proportion to benefits, as ought to
105 be the cardinal idea in every tax law." And in a note, the author further says, "In fact, lots above and below an established grade, are usually less benefited by the grading than the others, because the improvement subjects them to new burdens, in order to bring the general surface to the grade of the street, which the others escape." And the author further says: "It would be nakedly and arbitrarily the command of the law to each lot-owner to construct the street in front of his lot at his own expense, accord-

ing to a prescribed standard, and a power to issue such command could never be exercised by a constitutional government; unless we are at liberty to treat it as a police regulation, and place the duty to make the streets upon the same footing as that to keep the sidewalks free from obstruction, and fit for passage; but any such idea is clearly inadmissible."

The author further criticises the only case that can be quoted on the other side of this question, and says, "The case of

Warren *v.* Hurley, 31 Iowa, 31,

is opposed to the reasoning of the text, but the learned judge, who delivers the opinion, concedes that he is unable to support his conclusions on the authorities within his reach." And the author further says: "It would be nakedly and arbitrarily the command
of the law to each lot-owner to construct the street in front of
106 his lot at his own expense, according to a prescribed standard, and a power to issue such command could never be exercised by a constitutional government; unless we are at liberty to treat it as a police regulation, and place the duty to make the streets upon the same footing as that to keep the sidewalks free from obstruction, and fit for passage; but any such idea is clearly inadmissible."

The case of

Weeks *v.* Milwaukee, 10 Wis. 258,

which seems to be *contra*, but which in reality is not, is mentioned in a foot-note, Cooley's Constitutional Limitations, page 626, note 1. The reasoning of the court in that case is all against the justice and equity of the rule; but the court, after denouncing the rule, upholds its constitutionality under a power in the constitution of Wisconsin as follows: "It shall be the duty of a legislature, and they are hereby empowered to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations." The Wisconsin court held that this was a power given by the constitution itself to the legislature, to make such assessments, but Judge Cooley attacks this opinion with invincible logic.

107 This Wisconsin case also refers to the case of

Hill *v.* Higdon, 5 Ohio N. S. 243.

But, as Judge Cooley shows, that case was an assessment by the foot front, which is a very different rule.

The author says, speaking of the method like that of the Portland charter: "If such a regulation constitutes the apportionment of a tax, it must be supported, when properly ordered by or under the authority of the legislature; but it has been denied, on what seemed the most conclusive grounds, that this is permissible. It is not legitimate taxation, because it is lacking in one of its indispensable elements. It considers each lot by itself, compelling each to bear the burden of the improvement in front of it, without reference to any contribution to be made to the improvement by any other property; and it is consequently without any apportionment. From accidental

circumstances the major part of the cost of an important public work may be expended in front of a single lot, those circumstances not at all contributing to make an improvement more valuable to the lot thus specially burdened, perhaps even having the opposite consequence. But whatever might be the result in particular cases, the fatal vice in the system is that it provides for no taxing district whatever. It is as arbitrary in principle, and would sometimes be as unequal in operation, as a regulation that the town from which a
108 State officer chanced to be chosen should pay his salary, or that that locality in which the standing army or any portion of it should be stationed for the time being should be charged with its support. If one is legitimate taxation, the other would be. In sidewalk cases a regulation of the kind has been held admissible, but it has been justified as a regulation of police, and is not supported on the taxing power exclusively. As has been well said, to compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is to lay a forced contribution, not a tax within the sense of those terms as applied to the exercise of powers by an enlightened or responsible government."

The supreme court of New Jersey denounced a similar rule and said: "The question now arises, whether the assessment for grading is valid. So much of it as compels each lot to bear the expense incurred in front of it, whatever that may be, cannot be sustained, as such a principle must often work great injustice, making the lowest lot, where the most filling is required, bear the heaviest expense.

State *v.* Jersey City, 37 N. J. L. 129.

109 A method like this was adopted in Washington Territory under an act of Congress: "All taxes shall be equal and uniform, and no distinction shall be made in the assessments between different kinds of property, and the assessments shall be according to the value of the property." The supreme court of Washington held that the whole cost of the improvement should be apportioned under this act, between the several parcels, and could not be laid upon the property immediately adjacent.

II.

The next objection we make to this method is that it does not take into consideration the benefits, or apportion the assessments according to the benefits, or limit the assessments to the amount of the benefits. It may now be considered as settled in this country that an assessment for local improvements cannot be made upon any basis other than that the assessment must be limited to the amount of special benefit received by the owner from the improvement itself. That doctrine has been laid down and followed in this court, as will be shown in the authorities heretofore cited.

We are aware of the holding as to the fact that the legislature itself can determine that the property assessed is benefited and the

extent thereof, but these holdings all limit the rule to the case where
the method adopted by the legislature may result, and ordi-
110 narily will result in approximate equality, and where the
benefits to the property can be seen to probably and reason-
ably flow from the improvement. There are few cases that go farther than this, but all these cases have been set at rest by the case of the

Village of Norwood *v.* Baker, United States Supreme Court, and the cases that have followed that one in the circuit courts of the United States and in the State courts. We need go no further at this time than to refer to that case, and the others which are cited among our authorities elsewhere.

Mr. Cooley says: "Although, as has been stated, an assessment to frontage is really based upon the idea that the estates taxed receive a benefit in proportion to frontage, yet when the legislature have made benefits the rule of assessments, and provide for assessors or commissioners to ascertain and apportion them, it is not arbitrarily to be assumed that the benefits to any particular lot are in fact in proportion to its front on the improvement. In such cases the assessors or commissioners have a duty to perform, on inspection and examination of the several estates; and the report by them that they have assessed the expense by the foot front, without saying that they find the benefits in that proportion, does not affirmatively show a performing of their duty." Citing:

111 State *v.* Hudson, 27 N. J. 214.
State *v.* Hudson, 29 N. J. 104–115.
State *v.* Bergen, 29 N. J. 266.
Warner *v.* Grandhaven, 30 Mich. 24.

In New Jersey the legislature authorized an assessment on the owners of lots in proportion of two-thirds of the cost, the other third to be paid out of the city treasury. The court held that the legislature had the constitutional right to put the expense of paving the street as a special burden on the property in the neighborhood of such improvement; and held also that this power was limited. It declared this method unconstitutional, because the method did not take into consideration the special benefits to the property arising from the improvement. The New Jersey rule was not only not so onerous as our Portland rule, but it had the same vice that our charter has in this, that the legislature, in the law itself, particularized the property should be taxed, and charged against the property an assessment, without regard to benefits. The court cites with approval the case of

Tidewater Company *v.* Coster, 18 N. J. Eq. 518,

which decides that the cost of improvement may be imposed on particularized property to the extent to which such property was excep-
112 tionally benefited. And in the last-named case, Chief Justice Green defines the kind of benefits that must exist, as follows: "The theory on which such assessments are sustained as a legitimate exercise of the taxing power is that the property assessed is locally and peculiarly benefited over and above the ordinary benefit,

which as one of the community he received in all public improvements, to the precise extent of the assessment."

State *v.* Newark, 37 N. J. L. 416.

The last-named case was cited again, and the same principle applied in

State *v.* Jersey City, 37 N. J. L. 129.

In the last-named case the rule as to a part of the work was the same as the Portland rule. The court said: "The question now arises, whether the assessment for grading is valid. So much of it as compels each lot to bear the expense incurred in front of it, whatever that may be, cannot be sustained, as such a principle must often work great injustice, making the lowest lot, where the most filling is required, bear the heaviest expense;" as is the case with some of the lots in this assessment. In

Ill. Central Railroad Co. *v.* City of Bloomington, 76 Ill. 447,

113 the court decided that it was unconstitutional to compel a railroad company to pay the expense of constructing a crossing over said railroad for a street; because either that improvement would have to be made by a general tax, or assessed against the property benefited, and to the extent of the benefit. This case cites

The City of Chicago *v.* Larned, 34 Ill. 203,

The City of Ottawa *v.* Spencer, 40 Ill. 211,

Bedard *v.* Hall, 44 Ill. 91,

to the effect that the whole burden of paving a street upon the frontage of the property adjoining the improvement is repugnant to the Constitution, and that in making such improvements the benefits must be assessed upon all property enhanced in value thereby, and imposed on the same to the extent of the benefits, if required.

St. John *v.* The City of E. St. Louis, 50 Ill. 92.

The assessment was for the improvement in front of the lot, as in our charter. The court held this to be in conflict with the constitution of Illinois, which provides for equality of taxation by the corporate authorities of cities and towns. The case of

New York R. R. Co. *v.* New Haven, 42 Conn. 279

114 holds that to authorize a special assessment the benefits must be direct and certain, not remote and contingent; and the case of

State *v.* Elizabeth, 40 N. J. L. 274,

holds that the benefits must be present and peculiar, not merely intended or speculative. In the case of

State *v.* Elizabeth, *supra*,

the commissioners assessed a part of the cost of a sewer upon lots which had no lateral connection with the sewer, upon the idea that a sewerage system to be made in the future would bring these lots into connection with the main sewer; but the court held that such a benefit was not immediate and special, and was void. In the

State *v.* Elizabeth, 37 N. J. L. 330,

the assessment was for a railroad crossing, made upon the railroad company. The court held that this avenue did not cross the rail-

road near any of its depots, therefore no benefit was derived from the improvement, by reason of increasing facilities of access to its depot, and the probable increase of business thereby. It was also held that the assessment could not be supported on the other ground,
of benefits conferred in the advantage derived in the im-
115 provement of the company's lands, for the uses to which they
are appropriated. The proof was that the paving across the railroad track was an injury, rather than a benefit to the company. In this case, also, there was an assessment for constructing a sewer. The court held that this might be a benefit to the company's lands by draining the lands, but that the assessment was void because the sewer made no connection with the lands of the railroad company, and was of no benefit to such lands; and that the future building of sewers, to make such connections, could not be considered. In the case of

Thomas *v.* Gain, 35 Mich. 154,

the law provided that the common council should declare, by resolution, what lands would be benefited by the sewer, and then they were to make an assessment in proportion to the number of superficial feet herein. The court, by Cooley, judge, said: "The principal objection made to the assessment is that it is not apportioned among the parties benefited upon any principle recognized in the law. That it is made on a basis arbitrary, and consequently cannot be justified as an exercise of the taxing power. It is not claimed that an assessment by benefits would be inadmissible, but it is insisted that an assessment by the area of lots, irrespective of proportionate benefits, is nothing but a levy of arbitrary actions, and
therefore unconstitutional." The court then noticed the
116 frontage rule, which has been often upheld, and then said:
"But it is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful, as constituting a demand to appropriate private property to public uses." This idea is strongly stated in

Tidewater Company *v.* Coster, 18 N. J. Eq. 519,

which has often been cited with approval in other courts. "It is admitted that the legislature may prescribe the rule for the apportionment of benefits; but it is not conceded that its power in this regard is unlimited. The rule must at least be one which it is legally possible may be just and equal, as between the parties assessed. For it is not conceivable that the rule prescribed is one that will apportion the burden justly, or with such approximate justice as is usually attainable in tax cases, it must fall to the ground like any merely arbitrary action which is supported by no principle. The only discretion which the act in question allows to the common council as an assessing board is in determining what lands are benefited by the improvement. When that determination is made, the rule of apportionment is fixed, and it must be made according to the area. It is not required that the lands shall lie contiguous to each other, or that the benefits to be taken into account shall be only the direct benefits to the land. We find nothing in the act to

preclude the taxation of lands remote from the sewer, if their
117 market value, actual or speculative, is increased by the improvement of it. While this increase of value might be a reason for general taxation, for sewer purposes, it is manifest that it could not possibly warrant an apportionment by superficial area, since that, under no circumstances, could be just, unless limited to land directly and peculiarly benefited. But this act makes no provision by which parties assessed may of right drain into the sewer, so as to be enabled to reap the benefits they ought to derive from the expenditure. And the court say that when the assessment is levied by an arbitrary standard, which requires the burden to be laid upon lands far from the sewer and only slightly benefited equally with those fronting upon it, and greatly benefited; it is manifest that it must not only work injustice, but that in some cases it may amount to actual confiscation. It is not, therefore, legally possible that such an apportionment of the cost of sewers can be just or equal, or in proportion to benefits, and when injustice must result from its adoption we have no alternative but to reject the assessment as an unlawful exaction. It is an assessment made in entire disregard of the principle upon which special assessments can only be sustained, the principle, namely: that those who enjoy the benefits shall equally bear the burden. Citing:

Wright *v.* Boston, 9 Cush. 233–241.

Matter of Washington Avenue, 69 Penn. St. 360.

118 Patterson *v.* Society, 24 N. J. 385.

In Lee *v.* Ruggles, 62 Ill. 47,

the land assessed for a sewer was divided by the law into three classes, the first class being the highest rate of taxation, and to be a percentage on the assessment of the county treasury for the year 1869, and in no case exceeding 50 cents per acre. The second class not to exceed 40 cents per acre, and the third class not to exceed 30 cents per acre. This was held to be void, as against the constitution of Illinois, following

City of Chicago *v.* Larned, 34 Ill. 279,

to the effect that there did not exist, under the constitution, a power of apportioning taxes, whether of a general or of a local character, except on the principle of equality and uniformity. The court said: "It would not follow that the lands would be benefited to the extent of the amount of money expended in the drainage of them, much less that any particular tract would be benefited to the extent of the tax imposed upon it. Manifestly a tax, assessed upon such a basis, would not be one assessed upon each tract of land, only to the extent of the special benefits conferred on it." In the case of

Tidewater Company *v.* Coster, 18 N. J. Eq. 519,

119 the assessment was for draining tidewater marshes, and the commissioners were employed to assess upon the lands, when reclaimed, a just proportion of the contract price. This was held void, inasmuch as the expense to be levied on the land was not limited in amount to the extent of the benefit to be conferred. In this case the statute was held void, because it did not require that the apportionment of expenses should be limited, as the maximum rate,

by the increase in the value to result from the improved condition of the land. This case cites the

Matter of Canal Street, 11 Wendall, 154,

to the effect that excess over the benefits is private property taken for public use without just compensation. And further citing the following cases:

Matter of Fourth Avenue, 3 Wend. 452.
Matter of Albany Street, 11 Wend. 149.
Matter of William and Anthony Sts., 19 Wend. 678.
Matter of Flatbush Ave., 11 Barb. 286.
Nichols *v.* City of Bridgeport, 23 Conn. 204.
State *v.* Newark, 37 N. J. L. 185.

120 The supreme court of Texas has recently applied the doctrine of Norwood *vs.* Baker, overruling all former decisions of the Texas courts holding to the contrary. This case, Hutcheson *v.* Storrie, is instructive, because it declares unconstitutional a charter substantially like ours, the language of which is as follows: "The cost shall be defrayed, in case of street improvements, by the owner or owners of the lot or lots, block or blocks, tracts of land, when not laid out into lots and blocks, abutting on such street or portion of street improved, according to the cost of work in front of the particular lot or block or tracts of land."

The Texas court held that no discretion was lodged with the city council to determine the assessment, but that the charter absolutely fixed the rule by which the assessment is to be governed, just as ours does; and for that reason, and because no provision was made for determining the benefits, it was held to be within the rule laid down in Norwood *vs.* Baker.

The case of Norwood *v.* Baker has also been applied by the circuit court of the United States in Indiana, where it was held, upon the authority of that case, that the statute was invalid that required lot-owners to pay for the improvements by the front foot, without any provision for considering or determining the question of benefits.

121 Charles *v.* The City of Marion, 98 Fed. Rep. 166.

In Lyon *v.* the Town of Tonawanda, the circuit court of the United States for the northern district of New York decided that an assessment by the front-foot rule, without regard to benefits, is in violation of the fifth and fourteenth amendments of the Constitution of the United States. The Norwood case was also applied here, and held to govern such a case.

Lyon *v.* Town of Tonawanda, 98 Fed. Rep. 361.

To the same effect the Norwood case was applied in the case of

Fay *v.* City of Springfield, 94 Fed. Rep. 409.

Applying the doctrine of these cases to the case at bar, we find that the Portland charter does not vest in the city council any authority, under this procedure, to make any other assessments than according to the costs of the repair or improvement in front of each

particular lot, and therefore it does not authorize the common council to consider the question of benefits at all. When a majority of the property-holders petition the council for an improvement or repair, or when it is declared to be expedient to make a repair without any petition, then the council must order the improvement or repair to be made in the particular manner designated in the charter, and it makes no difference what the cost thereof may be to any
122 particular property-owner, he has no right, under this charter, to question whether this improvement or repair is beneficial to him or not. Nor, if he did question it, can the common council hear his complaint, or give him any relief whatever.

III.

The next objection we make to the assessment in this case is that the assessment is for building an elevated roadway, and that the property, by reason of the physical situation thereof, and its relation to the roadway, cannot be benefited by the same. All of the authorities concur in holding that the benefits mentioned in this rule mean those that accrue to the property specially, and not those that are enjoyed in common with the rest of the community.

In this case testimony was taken of the members of the council, who each sought to uphold the assessments, by giving what he considered to be the benefits derived to the property by the improvements. We invite attention to this testimony. Every one of these gentlemen testified that the bridges did enhance the value of the property, but every one admitted that property could not be reached from the bridge, except by climbing down or jumping off it; and not one was able to point out any particular benefit to the property, except upon the assumption that a superstructure could be built on the property which would be upon the grade of the street and
123 bridge, and that the property so improved would be benefited by the bridge. The authorities that we cite elsewhere show that it is the present condition of the property that must be taken into consideration in determining the benefits, and not some future and hypothetical condition of it. It would be manifestly unjust to compel the property-owner to pay taxes upon property which he does not see fit to improve in a certain way, or to use in a certain way, based upon such use as a council, in their wisdom, would have him use it.

It is quite true that this roadway benefits in a general way all the property in a community, including plaintiff's other property, but that manifestly cannot be considered in this case.

In the case of

Alleghany City *v.* Railroad Company, 138 Penn. St. 375,

an attempt was made to assess the right of way of a railroad for the purpose of improving a street that lay parallel with it, the road-bed of the railroad company being some fifteen feet below the level of the street. The court held that the assessment was void, because from the first the right of way of a railroad could not possibly be benefited by the street, and that this one could not be benefited, from the fact that it was below the level of the street.

124 There is a rule in Pennsylvania that the property-owner cannot defend on the ground that his property is not benefited by the improvement, because the law presumes such benefit; but, notwithstanding this rule, court said that where the courts can declare, as a matter of law, that no benefit can arise, the legislature is powerless to impose upon the property the burden of special assessments. This case holds, moreover, that the constitutionality of assessments can only be sustained upon the ground that the property assessed is benefited by the improvement.

In the case of

The City of Boston *v.* Shaw, 42 Mass. 130,

the assessment was for a sewer, and there were some vacant lots lying along it. The assessment was made upon the valuation of the lots if there had been a house upon the land at that time. The court said that such an assessment was not according to the intended ordinance, even if the ordinance itself were valid. The ordinance was held to be unreasonable and unjust, and that the assessment should have been in proportion to the value of the several estates.

In the case of

City of Bloomington *v.* C. & A. R. R. Co. 134 Ill. 458,

125 It was held that an improvement of the street could not be charged against a railroad company because it was of no benefit to the company, but an injury.

In O. & C. R. R. Co. *v.* City of Portland, 25 Or. 229,

this court held that an assessment was void because the property could not possibly be benefited. There seems to have been two grounds for this conclusion, namely, that the roadway was not used by the public, and that it being elevated above the property no benefit could arise thereto.

IV.

The next objection we make to this method of assessment is that the charter does not provide any notice to be given of the proposed assessment, and, if such notice were given, does not provide for any hearing of objections to the amount of assessments. Under the charter, the assessments are not determined until after the work is completed and accepted from the contractors. (Sections 137-138.) A notice to the property-owner is provided after the work is done and before it is accepted, but this notice is only to allow the property-owner to object to the acceptance of the work on the ground that it has not been completed in accordance with the con-

126 tract. (Section 137.) If the board determines that it has been completed in accordance with the contract, "the auditor shall thereupon prepare an assessment to cover the entire cost." (Section 138.) After this no further notice is required to give the owner opportunity to contest the amount of his assessment. It has then become final and is at once entered in the city lien docket under the instruction of the board, and becomes a lien. (Section 139.)

But suppose a property-owner should appear at such a meeting, and after his assessment has been made, protest against the same, on

the ground that it was in excess of benefits to his property. There is no power in the council to give him heed, for the amount of his assessment is fixed by the probable cost of making the improvement, and the council cannot either increase or diminish the probable cost of an improvement, for that cost is fixed by considerations entirely out of the power of the council. The nature of the improvement having been already determined, the cost follows as a matter of course.

We notice here the absence of any provision for a hearing upon the question of the amount of the assessment of each individual property-owner, because this absence indicates that it was not the design of the legislature that any property-owner should have any notice. As soon as the probable cost is determined it is to be
127 declared by ordinance, and the assessment entered in the docket of city liens. (Section 139.) And when so entered, the same is to be deemed a tax levied and a lien upon the property, which shall have priority over all other liens or incumbrances whatever. (Section 140.)

We concede that notice may not be essential to authorize the council to order an improvement or repair, because that is a public matter; but it is when the council lays its hands upon the individual's property to pay for it, that such individual has a right to be notified of the proceeding. It is so held in the case of

Paulson *v.* The City of Portland, U. S. Sup. Ct., cited elsewhere.

We are aware that this court has held, following the case of

Paulson *v.* The City of Portland, 149 U. S. 30,

that the charter is not invalid because it contains no requirement for notice, the reason being that the requirement is implied, but we suggest that the charter here excludes the implication of notice, for the reason that the assessment is required to be made at the very session of the council when the probable cost is determined, and instanter the assessments are required to be placed upon the city lien docket. The assessment then becomes a charge. No time is given for notice. But, however that may be, in this case no notice
128 was in fact given, or pretended to be given, but the assessments were determined and placed upon the city lien docket on the same day.

The cases cited in point 6 rule that a similar assessment is invalid for want of notice and opportunity to be heard.

In Tidewater Co. *v.* Coster, the court also decided that the parties whose property is to be taken in summary tax proceedings are entitled as a right to be heard at some stage of the proceedings, before the tax shall become an established charge against them or their property. The court quotes from the case of

Philadelphia *v.* Miller, 49 Penn. St. 440–448,

that notice, or at least the means of knowledge, is an essential element of every just proceeding which affects rights or persons or property. Citing also

Butler *v.* Supervisors of Saginaw, 26 Mich. 22.

Conclusion.

Against these authorities, counsel for respondents rely upon the case of

King *v.* The City of Portland, 2 Oregon, 146.

On examination of that case, and of the briefs printed with the opinion, it will be seen that the questions we make against
129 this charter were not raised or decided in that case. The principal contention there was that the constitution of the State, section 33 article 1, section 1 article 9, and section 5 article 2, prohibited the assessment for street improvement. After deciding that the power exercised is the taxing power, and referring to section 32 article 1, of the constitution, the court say: "Does that section cover taxation or burdens for all purposes, general and local, State and municipal, revenue and benefit?" And, stating the case made by appellants, the court say: "Appellants insist, that if the council had the legal right to declare the mode of payment for such work, it should have been done under section 32, above cited, and that a tax, equal and uniform in its burden upon all property within the corporation of Portland, should have been levied." And so the court decided, as shown by the authorities cited in the language of the opinion, that the provision concerning equality or uniformity of taxation in the constitution does not require that all of the property in the city should be taxed to pay for a particular local improvement. That it was never meant in that decision to decide the question we raise is shown further, by the language of the court, as follows: "We see no reason, had we the right, for saying that the apportionment of the expenses for improving the streets upon the abutting lot is not as equal in its burden as any other means. The legislature hold that matter in their discretion, and has exercised
130 that discretion, and we may not say it has erred." This plainly shows that the court had not in mind that the charter of the city of Portland did not in fact provide for the apportionment of the expense of the improvement.

It was not intended, or decided in that case, that the property can be taxed without being benefited, or that no apportionment is necessary, or that, if its physical situation precluded a benefit, it could be taxed; or that the assessment could be made without notice, or opportunity to contest it.

The language of the court on page 150 further illustrates the ground of the decision. The court says: "When the city council decide upon the improvement of a street, that body may proceed, without any possible hindrance or objection, to ascertain and determine the probable cost of making same, and assesses upon each lot, or part thereof, its proportional share of such cost. The whole of the matter, as regards expense and apportionment, belongs to the discretion or judgment of the council, and the same charter declares that discretion or judgment as final, and in nowise reviewable." The court did not, apparently, notice that the said charter, then in force, was like that in force in the present case, in the respect that

the lot was liable for the full cost of improving one-half of
131 the street immediately adjacent to each lot, and of one-half of the intersections, where such exist; otherwise it could not have declared that the apportionment belongs to the discretion or judgment of the council. It is quite clear, that under such a provision, no discretion is lodged in the council to make any apportionment, or to vary the assessment in any particular, from the cost of the half street in front of it.

From these considerations, we contend that the case is not a point against us, but if it be otherwise, then the case would be in direct conflict with the later decisions of this court, and with the case of Norwood *v.* Baker, and ought to be expressly overruled.

Respectfully submitted.

PIPES & TIFFT,
Attorneys for Appellant.

132 PORTLAND, OR., *Sept.* 29, '00.

Due & legal service of the within brief is hereby accepted this day by *received* a copy duly certified to by A. P. Tifft of attorneys for appellants.

R. R. DUNIWAY,
Of Att'ys for Respondents,
By W. M. G.

133 In the Supreme Court of the State of Oregon.

A. N. KING ET AL., Plaintiffs and Appellants,
vs.
CITY OF PORTLAND ET AL., Defendants and Respondents.

Respondents' Brief.

Appeal from a decree of the circuit court for Multnomah county—
Hon. John B. Cleland, judge.

Pipes & Tifft, attorneys for appellants.

J. M. Long, Ralph R. Duniway and Fred W. Mulkey, attorneys for respondents.

Filed Nov. 5, 1900.

J. J. MURPHY, *Clerk*,
By J. W. REEVES, *Deputy*.

134 In the Supreme Court of the State of Oregon, October Term, 1900.

A. N. KING ET AL., Plaintiffs and Appellants,
vs.
CITY OF PORTLAND ET AL., Defendants and Respondents.

RESPONDENTS' BRIEF.

Statement of the Case.

This is a suit in equity brought by various property-owners to enjoin the collection of an assessment for the improvement of East Yamhill street.

The portion of the street improved lies between East Water street and East Fifth street in the center of the city, on the east side of the river.

135 The eastern terminus of this improvement is a partially elevated street, as is the street in controversy. The portion of the city where this improvement was made is so situated that during high water it is covered; in other words, the second river bank is about where the eastern terminus of this improvement is, and all the buildings constructed upon this flat are constructed upon piles similar to that which this roadway is constructed upon. During extreme high water, the water has been known to go above the grade line on Water street and as far east as First street.

The evidence in the case discloses the fact to be that this property had but little value and was entirely inaccessible for city purposes without the roadway, and that the buildings of the roadway increased the value of property assessed about $1,000 per lot, and in some cases more than that, but in all cases to an amount largely in excess of the assessment against any of the property in controversy. And that this increase in value was solely the result of this construction and a direct benefit to the property assessed to this amount.

The court found as a matter of fact that the common council, upon making the assessment, estimated the probable cost thereof, and gave notice thereof, and in making the assessment upon the property in controversy the common council took into consideration the question whether the property of the plaintiff would be benefited by the proposed improvement and the amount of such benefits, and the common council did apportion the cost of making said improvement according to the benefits of said property (Abstract, p. 26), and

136 that upon the giving of the notice of intention to make said improvement, which notice required all parties who objected to appear and show cause why the improvement should not be made, and at the time set for such hearing the common council considered the question of cost of this improvement in front of each lot abutting upon the street improved; also the lots liable for the cost of improving the intersections, and found that each of the said lots would be benefited in an amount, by reason of such improvement,

greater than the cost of this improvement, as assessed against each of these lots. (Abstract, p. 28.)

The first step taken by the common council looking after the improvement of this street was the resolution instructing the city engineer to prepare plans and specifications for the improvement, which plans and specifications were filed in the office of the city auditor.

This notice required property-owners to file whatever objections they had to the making of this improvement. The city engineer's plans were filed on the 16th day of November, 1898, and were complete and perfect in every way, so that it became a mere matter of calculation what the cost thereof would be. Notices were duly posted, as provided by said charter, upon the streets to be improved, and both the posted and printed notices called for objections to the proposed improvement by persons having an interest in the property to be improved. The time to file objections expired on the 12th day of December, 1898. Before this date the plaintiffs herein filed their objections and remonstrances against this improvement, and
137 one of the grounds of their objections was that they deemed the cost of the same was not warranted by the benefits that would accrue to the lots owned by these parties, and which the notice had notified them would be assessed for the cost of the same. This notice, with objections, was referred to the committee of the common council and was by this committee after investigation reported back to the common council with the recommendation that the objections were not tenable, and that the street be improved and that the cost thereof be assessed against the adjacent property. Thereupon the common council, after having considered the recommendation and objections, adopted the report of the committee and passed an ordinance authorizing the improvement of the street. There was in force at that time ordinance No. 9248, regulating the time and manner of the improvement of streets, and determining the cost thereof.

On the 17th day of January, 1899, the board of public works advertised for bids for the doing of this work. Such proceedings were had that the contract was let and the contractors entered upon the construction of the street, and when the street was fully completed and ready for acceptance, the city engineer so reported to the board of public works; thereupon the board directed the clerk to publish a notice that the street was ready for acceptance requiring all people who desired to do so to file objections. No objections having been filed, the street was accepted and reported to the common council for assessment.

On the 16th day of May, 1899, the common council passed
138 an ordinance declaring the probable cost of improving this street and making an assessment therefor. The charter passed by the special session of the legislature in 1898 was in force when this improvement was made. (Special session, 1898, p. 101.) The provisions for improving streets are found in section 126 to 161, inclusive. By section 127 the common council are authorized to improve streets. By section 128 the common council are not author-

ized to improve any streets until they pass a resolution of intention so to do, and describe the improvement, which resolution shall be posted for ten days, and published for ten days, and also posted on the street. All these notices shall state the fact of the passage of the resolution aforesaid, the character of the work proposed, and the time within which written objections or remonstrances may be made. Section 130 provides that if no remonstrance is filed by a majority of the property-owners, the common council shall be deemed to have acquired jurisdiction.

Section 131 provides that the auditor shall immediately transmit this ordinance to the board of public works.

Section 132 requires the city engineer to file with the board estimates and specifications. When these are filed they shall give notice that they will let the contract to bidders.

Section 133 provides that proposals for doing the work shall conform as near as possible to estimates prepared by city engineer.

Section 136 provides that the city auditor shall prepare an apportionment of the expenses of the street work.

139 Section 137 provides that when the work is so far completed as to enable the board to determine the cost of the whole thereof, the city engineer shall file written acceptance of the work completed. Thereupon the board shall advertise in an official paper for six days, stating when and where any objection may be heard to the said improvement, and any person may at this time appear and object to the acceptance thereof. If no objections are filed, or if the objections are overruled and the street is accepted, the board shall report the same to the common council.

By section 138 the auditor is required to prepare an assessment and report the same to the common council. Section 138 also provides how the cost shall be apportioned, viz: Each lot or part thereof within the limits of the proposed street improvement abutting upon the street shall be liable for the full cost of making the improvement upon one-half of the street in front and abutting upon it, and also for the proportionate share of improving the intersections of two streets.

Section 139 provides that when the probable cost of any improvement has been ascertained or determined, and the proportionate share thereof chargeable to each lot, the common council must declare the same by ordinance and direct the auditor to enter a statement in the docket of liens.

Section 138 provides that regular lots are 50 feet by 100 feet; regular blocks are 200 feet square. It also particularly provides for irregular blocks and apportionment of the assessment upon unplatted tracts.

140 It will thus be seen that the common council has complied with all the provisions of the charter.

The plaintiffs file their bill and allege these proceedings were and are null and void and constitute an attempt by the said city authorities and officers to take the property of plaintiffs away from them without due process of law and contrary to the fourteenth amendment to the Constitution of the United States, prohibiting

any State from taking property without due process of law, and contrary to the constitution of the State of Oregon, in that said proceedings violate section 4, article 11 of the State constitution, sec-ion 32, of article 1, of said constitution of the State.

Plaintiff- further alleges that the provisions of the act of the legislature incorporating the city of Portland aforesaid, in respect to improvements and assessments for making the same upon the property affected, are null and void and opposed to the provisions of the fourteenth amendment of the Constitution of the United States, and of the provisions of the State constitution hereinbefore referred to, that the method of assessment provided for in said act and in the ordinance passed in pursuance thereof, make- said assessments depend solely upon the costs of the improvements on the half street in front of the said property, and not in any manner upon the question whether the property is benefited by the same; and also in this, that the cost of the whole improvement is not permitted or authorized to be apportioned among or between the owners of the property affected by said improvement, but that each of said lots assessed is by the said charter and ordinances made a taxing district.

141 Wherefore, the plaintiffs pray that an injunction may issue against the city of Portland and its officers and against the said D. M. McLauchlan, as chief of police of said city, restraining and enjoining it and them and him from selling the said property for the collection of the said assessments; and that a decree may be made that all of the said ordinances and proceedings and assessments against plaintiffs' property and the entry in the docket of city liens thereof may be declared null and void, and that the same may be directed to be canceled of record, and the apparent lien thereof upon the plaintiffs' property removed, and for their costs and disbursements.

There is no sufficient allegation in the complaint to raise an issue of want of notice or whether plaintiffs were not allowed a hearing, thus depriving them of their property without due process of law.

Allen *v.* Portland, 35 Or. 420.

Shannon *v.* Portland, 62 Pac. 50.

The allegation in plaintiffs' complaint that the proceedings were "null and void and constitute an attempt by the said city to take the property of plaintiffs away from them without due process of law, contrary to the fourteenth amendment," etc. (Abstract, p. 19), is simply a legal conclusion.

Dewey *v.* City of Des Moines, 173 U. S. 193.

Powell *v.* Brunswick County, 150 U. S. 433.

Allen *v.* Portland, 35 Or. 420–456.

Shannon *v.* Portland, 60 Pac. 50–53.

Bolln *v.* Nebraska, 176 U. S. 83–91, 92.

142 General allegations, or, as in this case, general conclusions in a pleading always yield to a specific statement.

Wield *v.* Oregon Short Line, 21 Or. 59.

The pleading is construed most strongly against the pleader.
Pursel *v.* Deal, 16 Or. 295.
Kohn *v.* Hinshaw, 17 Or. 308.

Therefore, where the pleader alleges that the proceedings are null and void and attempts to deprive plaintiff of his property without due process of law, contrary to the State and Federal constitutions, it follows by a specific allegation that the provisions of the act of the charter making assessments are null and void "and in this particular" (Abstract, p. 19), then describing the particular, the general allegations yield to the particular allegations wherein plaintiff described in what manner the State and Federal constitution is violated.

Wield *v.* Railway, *supra.*

The plaintiffs have had due process of law.
United States—Fallbrook Irrig. Dist. *v.* Bradley, 164 U. S. 112, 17 Sup. Ct. 56; Paulson *v.* Portland, 149 U. S. 30; Lent *v.* Tillson, 140 U. S. 316, 37 Am. & Eng. Corp. Cas. 265; Wurts *v.* Hoagland, 114 U. S. 691; Kelly *v.* Pittsburg, 104 U. S. 78; Spencer *v.* Merchant, 125 U. S. 345; Hagar *v.* Reclamation Dist., 111 U. S. 701; Walston *v.* Nevins, 128 U. S. 578, 27 Am. & Eng. Corp. Cas. 198; Davidson *v.* Board of Adm'rs, 96 U. S. 97; McMillen *v.* Anderson, 95
143 U. S. 37; Roach *v.* Nevin, 128 U. S. 578; Palmer *v.* McMahan, 133 U. S. 660; Scott *v.* Toledo, 36 Fed. Rep. 385; Murdock *v.* Cincinnati, 44 Fed. Rep. 726.
California—Hagar *v.* Yolo Co., 47 Cal. 234; Hutson *v.* Woodbridge Protection Dist., 79 Cal. 90, 16 Pac. Rep. 549; Lent *v.* Tillson, 72 Cal. 404, 19 Am. & Eng. Corp. Cas. 640; *In re* Madeira Irrig. Dist. Bonds, 92 Cal. 296.
Georgia—Speer *v.* Athens, 85 Ga. 49, 32 Am. & Eng. Corp. Cas. 301.
Illinois—Hyde Park *v.* Spencer, 117 Ill. 446; McChesney *v.* Hyde Park (Ill.), 28 N. E. Rep. 1102.
Indiana—Garver *v.* Daussman, 114 Ind. 429; Reinken *v.* Fuehring, 130 Ind. 382, 37 Am. & Eng. Corp. Cas. 354; Law *v.* Johnson, 118 Ind. 261.
Iowa—Gatch *v.* Des Moines, 63 Iowa, 718, 18 N. W. 310; Stewart *v.* Polk Co., 30 Iowa, 9.
Kentucky—Nevin *v.* Roach, 86 Ky. 492.
Maryland—Ulman *v.* Baltimore, 72 Md. 609.
Massachusetts—Allen *v.* Charlestown, 111 Mass. 123; Hildreth *v.* Lowell, 11 Gray (Mass.), 345.
Minnesota—St. Paul *v.* Nickl, 42 Minn. 262.
Missouri—Springfield Cent. Nat. Bank *v.* Weaver, 137 Mo. 650, 37 S. W. 509; St. Louis *v.* Ranken, 96 Mo. 497; Eyerman *v.* Blakesley, 78 Mo. 145.
Nebraska—Hurford *v.* Omaha, 4 Neb. 336.
New York—*In re* De Peyster, 89 N. Y. 565; Stuart *v.* Palmer, 74 N. Y. 184; *In re* Ryers, 72 N. Y. 1; Town of Guilford

v. Cornell, 18 Barb. (N. Y.) 615; Astor *v.* New York, 37 N. Y. Sup. Ct. 539; Matter of Amsterdam, 126 N. Y. 158.
144 Ohio—Emery *v.* Cincinnati, 6 Ohio Dec. 44, 4 Ohio N. P. 220.
Oregon—Paulsen *v.* Portland, 16 Or. 450.
South Dakota—Tripp *v.* Yankton, 10 S. Dak. 516.
Texas—Lovenberg *v.* Galveston (Tex.), 42 S. W. Rep. 1024.
Virginia—Davis *v.* Lynchburg, 84 Va. 861.
Washington—Hansen *v.* Hammer, 15 Wash. 315, 46 Pac. 332.
Wisconsin—Meggett *v.* Eau Claire, 81 Wis. 326; State *v.* Stewart, 74 Wis. 620.
Hennessy *v.* Douglas County, 99 Wis. 129.
Ballingham Bay Co. *v.* New Whatcom, 172 U. S. 318.
Parsons *v.* Dist. of Columbia, 170 U. S. 45–51.
Mattingly *v.* Dist. Columbia, 167 U. S.
King *v.* Mullen, 171 U. S. 404.

The plaintiffs are bound to take notice of the laws.
Paulsen *v.* City, *supra.*
Hager *v.* Reclamation Dist., *supra.*
Spencer *v.* Merchant, *supra.*
Kentucky R. R. *v.* ——, 115 U. S. 331.
Railroad Tax Cases, 92 U. S. 575.
Lent *v.* Tillson, 140 U. S. 316.
Davis *v.* Lynchburg, 84 Va. 61.
Beaumont *v.* Wilks, 142 Pa. St. 198.
Kansas City *v.* Ward, 134 Mo. 172.
Dubuque *v.* Wooten, 28 Ia. 571.
State *v.* Elizabeth, 42 N. J. L. 56.
Petition of De Peyster, 80 N. Y. 565.
State *v.* Cowen, 41 N. J. L. 83.
145 State *v.* Plainfield, 38 N. J. L. 95.
State *v.* Jersey City, 24 N. J. L. 662.
Ladd *v.* Spencer, 23 Or. 193.
Barkley *v.* Oregon City, 24 Or. 515.

We might say that practically every State in the Union, with the exception of Tennessee, has held that the power was vested in the legislature to select an assessment district, or to leave it to some particular board or body to select such a district. Tennessee puts her objections to this rule upon a peculiar constitutional provision, which does not make her decisions an authority in any other State.

These same courts who have had occasion to pass upon the question have laid down the rule that the courts will hesitate to review the discretion of a city council in the matter of the exercise of the power of assessment, but where the method pursued by the council is itself actually in excess of the benefits, as in the case of Norwood *v.* Baker, 172 U. S. 269, or in a case where from the nature of the property there can be no benefit derived, and the act of the council is a flagrant outrage upon the rights of citizens, they will interfere, as in The Oregon & California Railroad *v.* Portland, 25 Or. 229.

The council gave the notices provided for by section 128 of the charter.

This was notice to property-owners, and was due process of law.

Ballingham *v.* New Whatcom, 172 U. S. 318.

146 Ky. Railway Tax Cases, 150 U. S. 331.
English *v.* Mayor, 2d Marr., Del. 63, 37 Atlantic, 158.
State Railroad Tax Cases, 926, 575.
Spencer *v.* Merchant, 125 U. S. 345.
Hager *v.* Reclamation Dist., 111 U. S. 701–708–710.
Davidson *v.* New Orleans, 96 U. S. 107.
Paulson *v.* Portland, 139 U. S. 30–37.
Paulson *v.* Portland, 16 Or. 464.
149 U. S. 30–39.
Gilmore *v.* Hentig, 33 Kan. 156.
English *v.* Tripp, 13 R. I. 50.
Allen *v.* Mass, 111 Mass. 123.
King *v.* Mullen, 171 U. S. 404.
Fallbrook Ir. Dist. *v.* Bradley, 164 U. S. 112, 167.
Lent *v.* Tillson, 140 U. S. 316.
Meggett *v.* Eau Claire, 81 Wis. 334.
Gleason *v.* Waukesha (Wis.), 3 Minn. R. 385.
Hennessy *v.* Douglas Co., 99 Wis. 129.
Amery *v.* City, 72 Ia. 701.
Clapp *v.* City, 35 Conn. 66.
Kentucky R'y Cases, 115 U. S. 331.
Adams *v.* City of Shelbyville, 3 Minn. R. 575.
Barkley *v.* Oregon City, 24 Or. 515.
Hood River *v.* Wasco County, 35 Or. 498.
Wilson *v.* Salem, 24 Or. 504.
Ladd *v.* Spencer, 23 Or. 193.

The very fact that the plaintiffs herein appeared and remonstrated against the making of the improvement shows that the owners
147 of the property had due notice of what the city intended to do, as is well and aptly said by the Supreme Court of the United States in Ballingham *v.* New Whatcom, that the property situated along a street is primarily benefited by an improvement, and that it is the duty of the owners thereof to take notice. And in Parsons *v.* District of Columbia, 170 U. S. 45–51, and in Mattingly *v.* District of Columbia, *supra*, the Supreme Court say that it is the duty of the adjacent property-owners to take notice of the legislative enactments as to assessments. The same rule is laid down in Barkley *v.* Oregon City, *supra*, and Wilson *v.* Salem, *supra*, and in Paulson *v.* Portland, *supra*.

There is a wide difference between the tax or assessment prescribed by a legislative body having full authority over the subject, and one imposed by a municipal corporation acting under a limited and delegated authority.

Having acquired jurisdiction and issued their notice that made their determination as to the necessity of the work and as to how it should be paid for, and when they made this determination and

gave the notice required by the charter, the owners of the property were bound to take notice of what was to be done.

Hager *v.* Reclamation Dist., *supra.*
Parsons *v.* Dist. Columbia, *supra.*
English *v.* Mayor, *supra.*
Hennessy *v.* Douglas County, 99 Wis. 129.
Fallbrook Irg. Dist. *v.* Bradley, 164 U. S. 112, 167.

As herein shown, the courts, both Federal and State, with
148 the exception of Tennessee, practically hold that the legislature of a State, in the absence of constitutional restriction, has the power to select a taxing district, provided that all persons subject to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed in the manner of selecting a district that shall bear the burdens of a given tax, or special assessment, and that it is not contrary to the fourteenth amendment of the Constitution of the United States for the legislature to make such a selection, and that the fourteenth amendment was not designed to interfere with the States in making this selection, it is therefore constitutional and valid.

Barber *v.* Connolly, 113 U. S. 27, quoted with approval in 174 U. S. 103.
Norwood *v.* Baker, 172 U. S. *supra.*
Morgan *v.* Trust Co., 170 U. S. 203–300.
Pacific Express Co. *v.* Seebert, 142 U. S. 339.
Western Union *v.* Ind., 165 U. S. 309.
Railway *v.* Beckwith, 129 U. S. 26–29.
New Orleans *v.* Light Co., 116 U. S. 650–661.
Jones *v.* Brim, 165 U. S. 183, affirming Barber *v.* Connolly and 165 U. S., page 182.
Ladd *v.* Gambell, *supra.*
Fallbrook *v.* Bradley, 164 U. S. 112.

These courts all holding that the legislature has the power to select the adjacent property and direct it to be assessed for the cost of an improvement, shows that it is not arbitrary, and that it has a substantial basis upon which to stand, and that the object
149 sought to be accomplished is reasonable in relation to the subject-matter and is therefore a valid subject of State legislation.

Fallbrook *v.* Bradley, 164 U. S. 112.
Railway *v.* Matthews, 174 U. S. 96–105, and authorities cited.

The idea of classification, or the selection of a class of property to pay for an assessment, as under our law, a district for sewers, adjacent and intersections for street improvement, is the legislative idea of equality, and the fact that in a given case there may be an inequality in no manner determines the constitutionality of the assessment.

Ladd *v.* Gambell, *supra.*
Railway *v.* Matthews, *supra.*

Tinsley *v.* Anderson, 171 U. S. 106.
King *v.* Mullins, 171 U. S. 404.
Henry *v.* Hoboken, 18 How. 272.
Brown *v.* N. J., 20 Sup. Ct. Rep., p. 77.
Fallbrook *v.* Bradley, *supra.*

Argument.

The charter is not in conflict with article 1, section 18, of the State constitution.

All that the appellants are entitled to in the case at bar is "due process of law." The legislature has the undoubted right to select a taxing district or leave the question of the selection of the district to some competent body. In this case, the legislature has selected the district and made proper provisions for notice and oppor-
150 tunity for the property-holder to be heard. They have done all that the constitution requires. They have declared by the enactment that the property will be benefited. This is the taxing power and is governed by section 32, of article 1, of the constitution. This article received a construction of our supreme court in the early days of our Statehood in the case of King *v.* Portland, 2 Or. 147, and this decision has become a rule of property in this State. This construction of the law has been for a long time accepted by the courts and the people, and unless it contravenes the Federal Constitution will not be disturbed.

Eddy *v.* Kincaid, 28 Or. 537.

Furthermore, this provision plainly refers to the taking of property under the power of eminent domain, and does not in any way abridge the taxing power of the State. Obviously this proposition is true; otherwise it would amount to stating that no tax for a public improvement could be levied upon the owner of private property unless a *quid pro quo* substantially equivalent was given to him. This would be a revolution in tax matters. If the proposition of counsel be true, it would be necessary, in the case of any taxes or assessments for any public improvement, to have an inquiry as to the special benefits conferred upon the tax-payer and make him compensation equivalent to the tax. Such a rule would overthrow the cases of Cook *v.* Portland, 20 Or. 580; Simon *v.* Northup, 27 Or. 487.

The language of the article of the constitution under consideration is not applicable to an argument on the subject of taxa-
151 tion, but would be applicable to a case of taking property by eminent domain. Taxation is a requirement by the government of a contribution, while a taking of property under the power of eminent domain is the taking of the property itself. If the tax is for general purposes, the presumption of benefits conclusively arises. If the tax is an assessment of benefits that an individual receives in addition to the benefits that all people receive, then he must have a notice and opportunity to be heard as to whether the tax shall be laid. Yet the assessment is nevertheless one of the sovereign attributes of the State, and is only subject to constitu-

tional conditions that the act authorizing the assessment shall not charge as benefits that which is not the subject of special benefits, or that which is special benefits, but can, from the act itself, be seen to be substantially in excess of actual benefits.

The assessment does not contravene article 1, section 10, of the State constitution.

It is said by the Supreme Court of the United States in Leeper *v.* Texas, 139 U. S. 462–46–: "That law, in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and that due process is secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice," citing Davidson *v.* New Orleans, 96 U. S. 97; Hager *v.* Reclamation District, 111 U. S.
701. This case was distinctly affirmed and approved in Maxwell *v.*
Dow, 176 U. S., pages 603–'4.
152 In Bailey *v.* Frush, 5 Or. 138, construing this provision of the constitution, says that it means "that equal and exact justice shall be dealt out alike to all."

This has been done in the case at bar. The provisions of the charter are general and apply alike to all.

The charter does not contravene article 9, section 1, of the State constitution.

King *v.* Portland, 2 Or. 147.
Ladd *v.* Gambell, 35 Or. 393.
City of East Portland *v.* Multnomah County, 6 Or. 62.
Fallbrook *v.* Bradley, 164 U. S. 112, 174.
Henderson *v.* Bridge Co., 166 U. S. 150.

The charter does not contravene article 1, section 32, of the State constitution.

Our supreme court in the case of the City of Portland *v.* King, 2d Oregon, 147, held that the meaning given the word taxation (section 32, article 1, of the State constitution) is that it applies only to defraying the general expenses of the government, and that the legislature is not prohibited by this section from assessing the expenses of a street improvement upon the lots abutting thereon. And it is within the discretion of the legislature to provide a mode of assessment for such expense. And the court there laid down the general rule that is applicable to constitutional questions, in which they say (page 153):

"It is not the province or duty of courts to declare the acts passed
by the Legislative Assembly to be unconstitutional upon
153 grounds seemingly reasonable; the case must be one in which the court can have no rational doubt, and the constitution of our State is to be liberally construed in upholding the constitutionality of the statutes." Citing cases. "Otherwise the court usurps the place of legislators and assumes to enact laws."

And in speaking of the constitution of the State of Oregon, the court says (commencing at the bottom of page 153):

"In the former (meaning the State constitution) it is fairly the reverse; the people, acknowledged to be sovereign, framed it as a restriction upon such powers as might be needed by the legislature over subjects enumerated therein. On all other matters the power of that body is unrestrained; it is absolutely sovereign, except when limited by the terms of the constitution alone."

"Upon the subject of taxation, certainly, unless the constitution contains plain restrictions, the control of the legislature is absolute. It represents the people, and if these latter have not ceded away that right, they may, in State or municipal character, or by their representatives, determine upon assessment or taxation for any and all purposes deemed for the proper interest of those concerned. The improvements to be made upon streets, being for the public use, are a public benefit; yet it is equally true that these improvements inure to the benefit of those in the immediate vicinity of the work disproportionally with that of those living in a remote part of the community, whose property is not increased thereby in value, and who may seldom, if ever, use that portion of the public
154 highways, assuming it to be a public work, to be used by the public, and claiming also that the act of the city council was the exercise of the power called the right of taxation."

And the court cites with approval from

People *v.* Mayor, 4 Comstock 420,

wherein the supreme court of New York held it to be settled law that the legislature, apart from constitutional restriction, may levy taxes and devise ways and apportionment thereof in such manner and to any extent they may deem advisable.

King *v.* City, 2d Oregon, page 155.

And the court say, at page 161, in this decision: "The term taxation in section 32, article 1, must be limited alone to the meeting of such expenses as are necessary for the maintenance of the general government of the State, county, city, etc., and that the full power resides in the Legislative Assembly to provide for other expenses, belonging to any other branch of taxation in their discretion, and that such discretion is final; that the Legislative Assembly has exercised its powers in restricting the authority of the city of Portland, and we may not say whether sufficiently done or not; and that the granting to that city of the right to apportion expenses for improving a street upon adjacent lots was a rightful exercise of legislative authority, and must be upheld."

This case has been approved in the case of Meier *v.* Kelly, 20 Oregon, page 86, and is cited in Hayden *v.* Atlanta, 70 Georgia, 823.

Taxes are imposed upon the person for the benefit of the
155 government, as assessments are imposed upon property because the property is benefited. Therefore, so far as respondent is concerned in this case, he occupies a sort of dual position.

Plaintiff will fail in his appeal to the constitution. The act applies equally to all. That is all that is required by the constitution.

In Giozzat *v.* Tiernan, 148 U. S. 659, the court say: "Nor in respect

of taxation was the amendment intended to compel the State to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class.

"Belt's Gap R. R. Co. *v.* Penn. 134 U. S. 232.
"Home Ins. Co. *v.* N. Y., 134 U. S. 594.
"Pacific Exp. Co. *v.* Seebert, 142 U. S. 339.

"And due process of law within the meaning of the amendment is obtained if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.

"Leeper *v.* Texas, 139 U. S. 462."
See also the exhaustive opinion and the cases there cited of Magoon *v.* I. T. & L. Bank, 170 U. S. 283.
Crawford *v.* Linn County, 11 Or. 482 on 492, and cases there cited.
Henderson Bridge Co. *v.* Henderson, 19 Supreme Court Rep. 553.

156 In Aurora *v.* McGammon, 138 Mo. 38, tax of $3.00 on stocks of $1,000.00 or more, and only $2.00 on stocks of less than $1,000.00, was sustained.

In Hammond *v.* Muskegon School Board, 109 Mich. 676, fee of $1.00 for certificate as teacher from men and only 50 cents from women was sustained.

In the case of Sears *v.* Boston (Mass.), 43 L. R. A. 834, it was decided that assessments for the sprinkling of streets within a certain territory may be lawfully made upon abutting property, although the sprinkling of other parts of the city is done at public expense.

As long as the classification is not unreasonable, is equal to all in the same class, the constitution of the State does not limit the discretion of the legislature of Oregon.

The classification adopted by the charter is legal in Oregon.
Ladd *v.* Gambell, 35 Or. 393.
Crawford *v.* Linn County, 11 Or. 482, on 492–494, and cases there cited.
Holton *v.* M. County, 93 N. C. 430.
Youngblood *v.* Sexton, 32 Mich. on 414.
State *v.* French, 17 Mont. 54.
Com. *v.* M. N. Bank, 168 Pa. St. 309.
Gelsthorpe *v.* Furuele, 20 Mont. 299.
East Portland *v.* Multnomah County, 6 Or. 62.
Cook *v.* Portland, 20 Or. 580.
Cooley's Const. Lim. (6th ed.), 620–621.

157 The supreme court of Oregon, in the case of King *v.* Portland, 2 Oregon, 147, in a carefully considered opinion, which opinion has been affirmed time and again, and which has never been questioned, and which has become a rule of property in this State, decided that in the levying and collecting of street assessments

the legislature is not restrained by any provisions of our State constitution; that said sections of the constitution refer to taxation for general purposes, and not to a duty or assessment for local improvements.

Crawford *v.* Linn Co., 11 Or. on 485, 486, 487, 488, 491–'2.
See also Masters *v.* Portland, 24 Or. on 167.
Cooley Const. Lim. (6th ed.), 622–623.
Spencer *v.* Marchant, 100 N. Y. 585; S. C., 125 U. S. 345.

Under the above decisions the legislature can adopt any plan of levying the duty to pay for street improvements that appears to the State legislature to be wise. Under this unlimited power which belongs to a sovereign, the legislature passed said bonding act.

It is immaterial that the rule of apportionment between property-owners on the same street improvement whose assessments are not the same. The Oregon legislature may in its wisdom require that street assessments may be levied by a uniform rule, upon the abutting property, and which comprises the special district. In other words, the Oregon constitution contains no limitation upon
158 the sovereign legislature in apportioning the burden of street assessments upon the property benefited.

Sears *v.* Boston, 43 L. R. A. 834.
See R. R. Co. *v.* Otoe County, 16 Wall. 667.
25 Am. & Eng. Enc. of Law, p. 516.

It follows from the decision of King *v.* Portland, 2 Or. 147, that the slight difference in the rule of apportionment of this local street assessment does not entitle the plaintiff to relief.

The case of O. & C. R. R. Co. *v.* Portland, 25 Or. 329, was a case where the legislature authorized the common council to assess property benefited for street improvement, and the common council undertook to assess property for street improvement when property was so situated that it was impossible for it to be benefited.

The only decision on the question is the case of King *v.* Portland, 2 Or., and that case is conclusive on the question. It is useless to cite decisions from other States about a question arising under the constitution of Oregon after our supreme court has decided this question.

Again, it is a rule of constitutional construction that where courts are called upon to pronounce upon the validity of an act of the legislature upon constitutional grounds, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt.

Cooley on Constitutional Limitations, 218.

159 "The opposition between the constitution and the law should be such that the judge feels a strong conviction of their incompatibility with each other.

"The constitutionality of a law, then, is to be presumed, because

the legislature, which was first required to pass upon the question, acted, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restriction laid by the constitution upon their action, have adjudged that it is so."

Cooley on Constitutional Limitations, p. 219.

And therefore the court will, if possible, give the statute such a construction as will enable it to have effect.

Cooley on Constitutional Limitations, p. 220.

Is an act unconstitutional where it permits all persons to have equal benefit of the law? And where he cannot pay in cash or perform the work himself without depriving himself of the benefit of the act? Or, in other words, if a man has done his improving himself, as he is authorized under the charter, or pays for his improvement in cash, he is charged with the burden of the improvement act without any corresponding benefit. Or where his property is so situated that it will not receive any direct or appreciable benefit resulting from the improvement of a street. For instance, where a street is improved in one part of the city, and his property is situated in another and distant part of the city, it is said by our supreme court in Crawford *v.* Linn County, 11 Oregon, at page 490:

"If equality were practicable, in what branch of the Government would power to enforce it reside? Not in the judiciary, un-
160 less it was competent to set aside a law free from collision with the constitution, because it seemed unjust. It could interfere only by overstepping the limits of its sphere, by appropriating to itself a power beyond its province; and by setting an example which other organs of the Government might not be slow to follow. It is its peculiar duty to keep the first lines of the constitution clear; and not to stretch its power in order to correct legislative or executive abuses. Every branch of the Government, the judiciary included, does injustice for which there is no remedy, because everything human is imperfect. The sum of the matter is that the taxing power is left to that part of the Government which is to exercise it." And at page 491 the court say: "This power may be unwisely exercised or abused, yet it is a power intrusted by the constitution to the legislature, to be exercised within the scope of the grant, and is subject alone to their discretion, with which the judiciary have no right to interfere, because in their judgment the action of the legislature is contrary to the principle of natural justice. So, assuming taxation to be unequal and unjust, it is not within the power of the court to interfere and declare it illegal where it contravenes no constitutional provision. So the legislature have full power to determine what property shall be subject to taxation, and what shall be exempt. For instance, if the legislature have power to levy special taxes, they thereby have power to exempt, either expressly or impliedly, all other property from taxation.

The legislature has power to divide the property selected
161 into classes and to prescribe different rates of taxation for each class, or different rules of valuation for different classes of property."

Crawford *v.* Linn County, 11th Oregon, [illegible]

For instance, we frequently have acts of our legislature—and I know of none of them that have ever been held unconstitutional—which provide that if any man shall pay his taxes that he shall have a rebate, although no penalty is placed upon the amount, if he does not take advantage of the rebate. If a large number of men were to take advantage of the rebate, the necessary revenues could not be raised, and thereby indirectly the man who does not take advantage of the act is compelled to pay his proportion of the deficiency that arises out of next year's assessments.

The law of this State exempting credits has frequently been upheld, both by the bar and by our courts.

The law exempting credits was on the statute books for a good many years, as well as the law taxing mortgages, and was held valid both by our own courts and the Supreme Court of the United States.

In the case of credits: A and B live side by side; have the same class of property, either real or personal; A is free from debt and B is not. A takes the benefit of his credits, and thereby reduces the amount of burdens he has to pay for the support of the Government, in proportion to that paid by B. No one has ever considered that act unconstitutional upon that ground.

In other words, it is impossible to so lay taxes as to have them theoretically correct. As is said by Judge Cooley, at page 604 of his work on Constitutional Limitations: "In the first place, taxa-
162 tion having for its only legitimate object the raising of money for public purposes and the proper needs of government, the exaction of money from the citizens for other purposes is not a proper exercise of this power, and must therefore be unauthorized. In this place, however, we do not use the word public in any narrow and restricted sense, nor do we mean to be understood that whenever the legislature shall overstep the legitimate bounds of their authority the case will be such that the courts can interfere to arrest their action. There are many cases of unconstitutional action by the representatives of the people which can be reached only through the ballot-box; and there are other cases where the line of distinction between that which is allowable and that which is not is so faint and shadowy that the decision of the legislature must be accepted as final, even though the judicial opinion might be different."

And as said by Judge Cooley at page 604 of his Constitutional Limitations:

"The power to determine the person or objects to be taxed is intrusted exclusively with the legislature to determine, but over all these objects the burden must be spread, or it must be unequal and unlawful as to such as are selected to make the payment."

As Judge Cooley says: Thus it will be conceded that the proper authority to determine what should and should not constitute a public burden is the legislative department of the State.

If in the district certain portions of property should be taxed at one rate, in proportion to the value, and another portion at a
163 much lower rate, while taxed for proper local purposes, the latter class was exempt legally.

Cooley on Constitutional Limitations, p. 604.

This doctrine is the same doctrine as is laid down by our supreme court in the case of Crawford *v.* Linn County, 11th Oregon, 483; approved in Hogue *v.* McKay, 23 Oregon, 341.

As said by Mr. Chief Justice Bean, in the case of Simon *v.* Northup, page 495: "It is stoutly contended that the act in question is unconstitutional, for the several reasons hereinafter noticed; and, while we are satisfied that the contention is well founded in some respects, and are conscious that in others the validity of the act is not free from doubt, yet we cannot declare it wholly void because some of its provisions are so and others are involved in doubt. The courts will never exercise the extraordinary power of declaring an act of the legislature unconstitutional unless there is a plain, palpable and clear conflict between the statute and the constitution, which, in our opinion, does not exist in this case: King *v.* City of Portland, 2 Or. 152; Cook *v.* Port of Portland, 20 Or. 580 (18 L. R. A. 533, 27 Pac. 263)."

Mr. Justice Bean, in further discussing the question of constitutional power and the power of legislatures to authorize municipal corporations to raise taxes for a public and beneficial purpose, like highways, concedes that such a tax or duty is for a public and beneficial purpose, and disposes of the question at page 497 in Simon *v.* Northup, 27 Oregon, in these words: "When the power is conceded, the courts cannot inquire into the expediency or manner of its exercise, or the motives or reasons prompting the particular act."

164 The language here used seems not only to be apt, but to settle the first phase of this constitutional question of the power of the legislature to distribute the benefits and to see that all property within the limits of the municipal corporation receives a certain proportion of the benefits as well as the property directly contiguous and adjacent to the street. This is within the same rule that Justice Bean applied in Simon *v.* Northup, *supra*, when the power is conceded to the legislature, the courts cannot interfere. When the courts conceded to the legislature the power in this case to enact laws governing the manner of the improvement of streets, the means and facilities for making and paying for these improvements. If that is within the general power of the legislature, and is not restricted by any positive or constitutional provision, then the question of discretion being vested in the legislature, and while in a given case it may seem to be unfair, or instances may arise in which people do not receive exactly equal benefits and advantages, or, we might say, equal protection under the law. But the courts even then will not interfere, because they are treading upon dangerous ground when they undertake to exercise functions and powers of the legislative branch of the Government.

As is said by Mr. Justice Harlan in the case of Henderson Bridge Co. *v.* City of Henderson, decided by the Supreme Court of the United States April 3, 1899, found in the 1st Municipal Reports, at page 699. At page 725:

"In determining a question of this character, the power to tax existing, a judicial tribunal should not enter into a minute

165 calculation as to benefits and burdens, for the purpose of balancing one against the other, and ascertaining to what

extent the burdens imposed are out of proportion to the benefits received. Exact equality and absolute justice in taxation are recognized by all as unattainable under any system of Government. The court of appeals of Kentucky, speaking by Chief Justice Marshall, in Cheaney *v.* Hooser, 9 B. Mon. 330, 345, after observing that there must necessarily be vested in the legislature a wide range of discretion as to the particular subjects or species of property which should be the subject of general or local taxation, as well as to the extent of the territory within which a local tax shall operate, well said: 'There must be a palpable and flagrant departure from equality in the burden, as imposed upon the persons or property bound to contribute, or it must be palpable that persons or their property are subjected to a local burden for the benefit of others, or for purposes in which they have no interest, and to which they are, therefore, not justly bound to contribute. The case must be one in which the operation of the power will be at first blush pronounced to be the taking of private property without compensation, and in which it is apparent that the burden is imposed without any view to the interest of the individual in the objects to be accomplished by it."

It is very evident, when one reads this case and the strong language used by Justice Harlan, that the distinguished jurist recognized that certain phrases used in rendering the opinion, in the case of Village of Norwood *v.* Baker, *was* receiving an erroneous construction from some courts and members of the bar, and
166 therefore Justice Harlan selected this opportunity to lay down the principles of law that would eliminate the dictum that had crept into the Norwood case and establish the rule that in no case would a statutory provision be declared void because the burdens were out of proportion to the benefits received, and only would be allowed in the cases where at first blush that burden was levied without any view in the interests of the individual and the objects to be accomplished, or that the burden is laid for the benefit of others.

The bridge company in this case seriously contended that in taxing their bridge that they had not been granted equal protection of the laws, in that their property had been subject to taxation from which all other lands not divided into lots had been exempt. This contention was based on the proviso in the city's charter declaring that "no land embraced within the city limits, and outside of ten-acre lots as originally laid off, shall be assessed and taxed by the city council, unless the same is divided or laid out in lots of five acres or less; and unless all of same is actually devoted to farming purposes."

Justice Harlan says of this (page 730):

"We are of opinion that this proviso has no reference to bridges, etc., but refers only to lands capable of being cultivated, or used and divided into lots. * * * In this view, there is no basis for the suggestion of a denial of the equal protection of the laws, particularly as it is not contended that the city applies to the assessment of
the bridge and its approaches for taxation any rule that is
167 not applied to all property within its limits. As in the case

of property of others, the bridge and its approaches are required to be taxed upon their value."

Thus it will be seen that Mr. Justice Harlan, speaking the view of the unanimous court, laid down the rule that limits the rule in the Norwood case, and eliminates out of it the features contended for by a good many lawyers, that all assessments upon frontage area or districts *is* in contravention of the fourteenth amendment and void. But instead of its being void, Mr. Justice Harlan declares that so long as the legislature selects a class of property and gave each man within that class the equal protection of the law, then no man can complain under the fourteenth amendment of unequal burdens. Because the legislative branch of this Government means that some discretion and some power. They must be able to say what property shall be assessed and what shall not, or the result would be disastrous both to civil government and to judicial construction. If the power rested solely in the judiciary to exercise the functions of taxation and assessments, we would then do away with one branch of our Government and would have to depend entirely upon judicial construction. And judicial construction would depend upon what seems right or wrong at first blush to the judiciary. We would never know whether a law was in force or not providing for assessment or taxation until it had received judicial sanction upon each phase as it arose before the court. Sources from which the Government receives its support would likewise be placed in a state of doubt until such time as the judiciary had an opportunity to pass upon it.

Assessment and taxation is a question that peculiarly belongs
168 to the legislative department of the Government. Conditions frequently change, and elections to the popular branch of the Government being frequent, legislatures are elected who adapt th-ir views to the changed conditions as they arise. This is a question of policy vested solely in the legislature, and is not a question of so doubtful propriety that the courts can say it is unconstitutional.

And therefore we respectfully submit that the power in the first instance being vested in the legislative department to both assess and tax, and that power having been exercised as the legislature deemed wisely, the judicial department will not disturb the same, and that the rule as laid down in Simon *v.* Northup, 27 Oregon, 495; Cook *v.* Portland, 20 Oregon, 580; King *v.* City of Portland, 2d Oregon, 152, will not be disturbed.

Ladd *v.* Gambell, 35 Or. 393.

The city charter is not in conflict with the fourteenth amendment to the Constitution of the United States.

There can be no question about rules of assessment for a local improvement; that is, that it is based upon the benefits to the property. Upon the rule of evidence, or as to the method to be pursued to ascertain what those benefits are, States have differed, in their legislation, but it is quite generally conceded that the legislature has the right to select a district; or, as the legislature has done in this case, declare what shall constitute a district, and authorize a local assessment, and as all the courts have decided that the

legislature has this power, therefore the question as to whether in a given case an assessment upon a particular piece of property might be in substantial excess of the benefits to that property
169 would in no manner affect the constitutionality of the law, for the reason that, while the law might create a hardship in a particular case, it is not a constitutional objection. For, under our form of government, the fact that a hardship is created does not create a constitutional right, or the fact that a person is favored under the law does not create a constitutional right. Therefore it must be conceded that the question of right to assess the adjacent property for a street improvement is constitutional and that matter of detail does not affect the constitutionality of the assessment.

Motz *v.* Detroit, 18 Mich., p. 522.

And that the legislature may prescribe the rule of benefits.

Village of Norwood *v.* Baker, 172 U. S., p. 286.

And that in order to attack a law on constitutional grounds the law must be free from doubt.

Our own supreme court has had occasion to express their opinion upon the rule of law to be pursued affecting the constitutionality of a statute, and this court has invariably held that, in order to hold a statute or an act unconstitutional, it must be free from doubt, and the rule that the attorneys attempt to invoke in reference to assessments that have been set aside where the municipal authorities have failed to comply with the law has no application to the case at bar, excepting so far as it applies to questions of remonstrance. For, under the charter, the legislature selected the property, created the district, and left it for the common council to decide when
170 the improvement should be made, subject to the right of the owner of the adjacent property to defeat the improvement by remonstrance.

And the question of benefits is necessarily considered by the common council. While they have under consideration the question as to whether the street shall be improved or not.

In the case at bar, before the improvement had been made, the testimony shows that they considered the question of benefits, and that the property would be benefited to a greater extent than the cost of the improvement, and the court finds as a fact that the property was benefited by the improvement. The notice and opportunity to be heard upon the question is not a notice and opportunity to be heard upon the question of sufficiency or validity of the law, but it is a notice and opportunity to be heard upon questions which are delegated by the legislature to the common council. And under our charter the legislature has not delegated to the common council the question as to the extent of the district to be considered, nor have they delegated to the common council the question as to the apportionment of benefits, but the law itself selects the district and apportions the benefits upon the basis that the legislature believes to be eminently fair, and as a matter of fact this law has been enforced for a great many years in the city of Portland, and if the law

itself had been unfair, where thousands upon thousands of dollars had been paid out for street improvements, some complaint would have been made.

As we have heretofore said, there is scarcely any law that
171 is passed, but what a man could suppose a state or condition of things or facts under which people would be injured by the law without a corresponding benefit.

The legislature must have had in view, in passing this law, the condition that existed in the city of Portland, and that the general law of the country is such that upon the whole the most equitable method to be used is the method that they have adopted, and the proof of that is the want of complaint for the twenty years in which it has had a practical test.

As is said in Birdseye *v.* Village of Clyde, 3 Mun. Rep. 13, and in The City of Cincinnati *v.* Connor, 55 Ohio St. 82, "it is the general policy of our legislature to restrain the power of local assessment by fixing a limit on the amount that may be levied, beyond which municipal corporations may not go; and, unless the contrary clearly appears, an intention to adhere to that policy in the enactment of particular statutes relating to local assessments will be presumed, and a construction given to them, if possible, allowing the application of the general limitations."

Adams *v.* City, 3 Mun. Rep. 575.

That rule aptly applies to assessments made under our law. The legislature requires the common council to publish a notice of intention to make a designated improvement or repair. And the undoubted object of that notice is to serve notice upon the public and the property-owners that the common council proposed to charge the cost of the improvement upon the adjacent property as provided by law, and at this time it became the duty of the property-owner to present himself before the common council and
172 show to the common council that the proposed improvement would be in excess of benefits. And while it is true that in a given case a hardship might be worked upon an individual property-owner, that does not affect the constitutionality of the law by any means, for the property-owner has had his opportunity to be heard, and the presumption is that if he had presented an objection and shown to a reasonable certainty that the cost of a given improvement or repair would be in excess of the benefits to the adjacent property, then the common council would have refused to have proceeded further in the premises, and the improvement or repair would not have been made.

It seems to us that the legislature has acted wisely in this matter. They have left the question as to when a repair or improvement should be made to the common council, to be acted on by it only after due notice has been given to the property-owners interested, that they may present themselves and show what reasons they have, if any, for not making the improvement. The statute specifically says that, should a majority of the property-owners remonstrate, that the same shall not be further proceeded with, section 130,

charter of 1898. By section 101 of the same charter it is provided that if no remonstrance be filed by a majority of the property-owners, the council may proceed within four months to make the improvement.

The question of whether a given improvement is in excess of the benefits may be a question of difference of judgment. If it is, certainly the judgment of the common council must prevail, otherwise we would be in a peculiar position; having officers charged
173 with a duty and having the sole power to exercise discretion in a given matter, and deprived of that discretion by the judgment of individuals whose personal interests might make them antagonistic to the best interests of the city.

Take, for instance, our method of assessment, and let us analyze it and see whether it is equitable and fair as a whole. But, as I have said, individual cases might arise where possibly there might be an excess of assessments over benefits, or where possibly one does not pay an amount equal to the benefit in proportion to what some other man pays upon the same street.

In the city of Portland the surface of the ground is practically the same. If a street is to be improved, portions of it have to be filled and portions of it have to be excavated. In figuring the cost of the fill, the contractor necessarily has to figure upon the cost of dirt to make the fill. He therefore says it is worth six cents a yard to cut in front of A's lot, and it is worth six cents a yard to fill in front of B's lot. That is practically the way all assessments are made upon street work. When it comes to the question of sidewalks, or surface improvement, the cost is practically the same in the one case as it is in the other; the only difference there can possibly be in any given case is the cost of excavations and fills, and that difference is so small that the legislature could not undertake, in my opinion, to adjust it upon a more equitable basis than they have under the law.

The charter requires each block to be figured upon separately, so as to draw it down to the smallest minimum; therefore if a contractors bids upon a street, each man makes an estimate of
174 the cost of the fills and the cost of the excavations. A may get the work of excavation and B the fills, and they figure the cost of the dirt that B has to buy from A, and A figures the value of the dirt if he has to sell to B. Thus it is seen that the matter naturally and equitably adjusts itself. This has been going on for a quarter of a century. It is the same principle that applies to railroad construction. It is the same principle that applies to all public improvements. The matter has evolved itself out of the experience of men, and the principle of assessments for street improvements in the city of Portland results from ripe experience of constructing engineers.

And another matter that is worth considering by your honorable body is that while these laws have been in force for the last quarter of a century and this character of assessments have been made, and on some streets have been repeated several times.

The city of Portland today has considerably over 100 miles of im-

proved streets of one kind or another, which the adjacent proper
owner in most cases has paid for. The central and business p
tions of the city, where the costly improvements are made, have
ways been borne by the adjacent property-owners. Suburban i
provements are never made until such time as there is a pub
demand in the immediate vicinity for them.

Counsel cites some cases upon the question of the physical con
tion of property. The court in the case at bar finds that
physical situation and condition of this property is such that it
benefited by this improvement. This finding the court undoubted
will not disturb.

175 In the case of the California Railroad Company there w
a finding to the contrary. People look at the location in
case of the California & Oregon Railway Company, 25 Or., p. 2
and they reach the wrong conclusion. As a matter of fact, the r
point in the Oregon & California Railway case was never presen
to the court, and that is that the railway company, by their own a
in building an embankment across this property eight or ten f
high, compelled the city to establish a grade at the height of th
railroad track, and they should not have been allowed to compla
But that point was never raised and passed upon by the cou
Lawyers look over the ground and pass upon the decision and
sume that all of those facts were before the court.

The City of Bloomington *v.* Railway Co., 134 Ill., is not applica
to the case at bar, for the court will readily see by an examinati
of the case that the property of the railway company was being u
for trackage and could derive no benefit from the construction o
street along the side thereof, because of its location, which was su
that the court found that the building of a street so as to facilit
and increase the travel next to the track was injurious rather th
beneficial.

The same rule is found in 138 Penn. 375. The Pennsylva
courts and the Illinois courts, as well as the Supreme Court of
United States, have quite generally held that the legislature co
select even railroad property and rights of way and assess agai
them benefits for street improvements, and the only point that co
sel undertakes to make is that the physical condition of t
176 property is such that it does not receive the same amount
benefits from street improvements that other property m
favorably located would receive.

This proposition can have nothing to do with the constitutional
of the law. As we have heretofore said, the presumption is that
common council, when it starts in to make an improvement, w
not make an assessment contrary to law. But they will consider
question as to whether the adjacent property is benefited or n
and their judgment and discretion in the matter, while it may
subject to review, in no manner affects the validity of the statute

The charter undoubtedly contemplates that this first notice t
is to be given of what the council proposes to do is the time wh
any man who objects upon any ground to appear and make th
objections known to the common council, and should the comm

council overrule his objection and proceed with the improvement, it would undoubtedly be the duty of the owner of the property to take steps at once to review the proceedings or to enjoin the city from proceeding further with the improvement, upon the ground that he was being deprived of his property without due process of law. As I have shown the fact to be that in a given case a hardship might be worked, in no way affects the constitutionality of the law itself. If the law is constitutional, then the proceedings were valid, unless the man in a particular case takes steps to review those proceedings.

In the case of The village of Norwood *v.* Baker, the vice of
177 the ordinance passed upon in that case was that it not only did not require compensation to be made, but made compensation impossible.

As was said by the Supreme Court in Williams *v.* Eggleston, 176 U. S., p. 311, "neither can it be doubted that the legislature, speaking generally, may create a new taxing district, determine what boundary should apply to said district, and what property should be considered as benefited by the proposed improvement."

In the case of The Illinois Central R'y *v.* Decatur, 147 U. S. 190, an assessment for grading and paving a street in Decatur was made against the right of way of the railway. By its charter, the road was exempt from taxation by reason of its paying to the State a certain per cent. of its gross income. The railway company resisted the assessment upon similar ground as in the suit of Bloomington *v.* R'y Co., 131 Illinois, at page 448, quoted by appellants, and upon the further ground that the railroad charter, under which they paid certain taxes to the State, exempted them from this assessment. The assessment was held valid by the Supreme Court of the United States, where the constitutionality was attacked. The opinion quotes from the decision of the supreme court of Illinois, which held valid the front-foot rule and announced the doctrine that where a city with authority by its charter to do so, that the improvement in front of a lot should be paid for according to its frontage. That such action by the city was final, and could "neither be disputed nor disturbed."

In Parsons *v.* District of Columbia, 170 U. S. 45, goes further in upholding benefit assessments than the Oregon supreme court
178 has ever gone. In that case the cost of the improvement was $1.50 per lineal foot upon each front foot upon both sides of the street, and the Supreme Court held this assessment valid and quoted from Judge Dillon as follows: "The courts are very generally agreed that the authority to compel the property specially benefited to bear the expense of local improvements is a branch for the taxing power or included within it, whether the expenses of making such improvement shall be paid out of the general treasury or be assessed upon the abutting property or other property specially benefited. And if in the latter mode, whether the assessment should be upon all the property found to be benefited, or alone upon the abuttors, according to frontage, or according to the area of their lot,

is, according to the present weight of authorities, considered to be a question of legislative expediency."

As was said by our supreme court in Ladd *v.* Gambell, *supra* "perfect equality in taxation laws is never attainable." And, as some courts have put it, it is impossible to adjust matters of taxation with mathematical accuracy. The improvement of streets by general assessments in the city would, in my opinion, be wholly wrong. The conditions of cities have changed in the last quarter of a century. In those days, outside of the immediate district, the principal use of the streets was ways to the country; but commercial and business enterprises have so changed these conditions that the streets are now far removed from their old use as ways. Furthermore, to require all property in this city to pay for a particular street, the use of which is largely beneficial to the adjacent property, and
179 will be worn out several times before the outlying districts can possibly be improved, would be to compel these people to bear a general tax largely beneficial to citizens in other portions of the community. It seems to us that the attacks that are now being made upon our law, which selects the district, declares what improvements the adjacent property shall pay for, is almost entirely the outgrowth of a misconception of the Norwood case and of what is meant by due process of law. One or two of the Federal courts have gone to a very great extreme. For instance, take the case from Missouri cited by counsel. One only has to read that decision carefully to reach the conclusion that the constitutionality of the statute depends upon the idea of the court as to which is the best method of assessment. The court in that case attacks the method pursued in Missouri and says that another method would be a better one. Suppose the next State should pass a law for the rule of assessment as suggested by the United States judge for the Missouri district, and the United States judge for the district of the other State should decide that the method that Missouri had thought wrong was a correct method, the court could then hold the assessment void because that town adopted a method which the Missouri court had declared constitutional. The same rule applies to the States in the Union. Whenever courts undertake to do legislative work, they get into deep water. They can declare a particular act unconstitutional and void. They can establish a bad precedent, but the time comes when they have to return to the fundamental principles of government, and leave
180 to the legislative branch to decide which method will best subserve the interests of the people and comes the nearest to demonstrating equal justice.

The Norwood case did not undertake to say that the legislature could not select the district, but the court did say that the legislature had authorized the common council to take into consideration in making their assessments matters that were not of special benefit to the adjacent property. For that reason the law was void. Had the law confined itself to matters of special benefit to adjacent property, the law would have undoubtedly been sustained.

Therefore the Supreme Court only concerns itself with the question of the constitutional power to pass the law, and as to whether those

matters which the legislature had not undertaken to dispose of and left the common council to dispose of, whether as to those matters notice had been given and an opportunity to be heard. And as to those matters which the law itself disposes of, the party has no right to a hearing before the common council. This point was distinctly raised and squarely passed upon in Parsons *v.* District of Columbia. There Parsons claimed he had no opportunity to be heard upon the amount of his assessment, which was fixed arbitrarily by the legislature at $1.25 per front foot, which was fifty cents per front foot more than the actual cost of laying the pipe. The Supreme Court said that Parsons was not deprived of his property without due process of law, because he must take notice of what the legislature had done, and was not entitled to a hearing.

181 If the position of counsel is true, that the legislature must delegate to somebody to discuss with the tax-payer the amount of his assessment or the rate of levy upon his property, then there have never been any cases of due process of law on the matter of taxation, and the same rule applies to special assessments where the legislature has selected the district and said what shall be done. They have left nothing for discussion between the State's agents or the property-owner, and as to those matters which the legislature had disposed of, the property-owner has no right to complain, so long as that which the legislature has disposed of is within constitutional limitations.

When the assessment is founded upon special and peculiar benefits to property from the expenditure on account of which the tax is laid, it is well established both by State and Federal cases that this class of taxation is permissible under the constitution of this State and of the United States.

I understand the courts make this distinction, that they will not disturb an assessment, even though it is of doubtful propriety, unless the excess of assessment over benefits is definite and certain, or made so by law.

As was said in Davidson *v.* New Orleans, 96 U. S. 107, where an assessment was levied upon a superficial area of land situated within a drainage district as would pay for the cost of construction. The effect of this law was to require each piece of land to pay for the improvement in proportion to the feet the tract sustained to the whole number of superficial feet in the district. The effect was to require each foot to pay for the assessment, whether it re-

182 ceived the same amount of benefit or not, or whether it would cost as much to drain one tract as it would another. It was complained that the amount of assessment upon plaintiff's land was excessive, and that part of the land received no benefit at all. To that argument the Supreme Court replied that it was a matter of detail so far as that court was concerned. It was not a constitutional question, therefore was not reviewable.

In Watson *v.* Nevin, 128 U. S. 578, an assessment was attacked upon the ground that it was an arbitrary and illegal method of assessment, and the Supreme Court of the United States held the objection not well founded; that the matter was for the decision of the

legislature, to which body the discretion was committed to create the district and to provide the means of payment.

In R'y *v.* Matthews, 174 U. S. 96, the Supreme Court of the United States held that the idea of classification of property for the purpose of assessment is that of inequality, and the fact of inequality in no manner determines the constitutionality. This in effect, is the same rule adopted by our own supreme court in the late case of Ladd *v.* Gambell, where the court says: "Perfect equity in such an assessment is hardly attainable. An approximation is all that can be reasonably expected, and the fact that the legislature in the exercise of its wisdom has seen proper to divide the property-owners into classes according to the amount of their respective assessments and provide a method of payment equal and uniform in each of the several classes, do- not, in our opinion, render the act void. Force and effect must be given to the legislative will in this respect."

183 In other words, the legislature, under the charter of 1898, selected the property which it declared to be benefited by any street improvement, and only left to the common council the discretion of saying when public necessity required an improvement to be made.

The council then gave the notice under which the property-owners appeared and objected to the improvement on the ground that the cost would exceed the benefits. These objections the council overruled and proceeded with the improvement. It then became the duty of the appellants to take steps to have the proceedings of the council reviewed or to enjoin the city from proceeding further with the improvement.

Weed *v.* Boston, 172 U. S., 28, 29.

The appellants rely almost entirely on the cases of The Tidewater Company *v.* Carter, 18 N. J. E. 518, and the case of Norwood *v.* Baker, 172 U. S. 269.

Tidewater *v.* Coster.

This was a special act of the legislature authorizing the reclamation of certain lands near Newark, New Jersey. The act authorized commissioners to make contracts for draining these lands, and when the drainage had been completed, "assess upon the said lands so reclaimed a just proportion of the contract price."

The contracts were awarded, and at this stage of the proceedings the parties owning the swamp enjoined the proceedings.

The court says that the drainage of such land is no doubt the subject of legislation. "This large district is now comparatively useless. In its present condition it impairs very materially the benefits which naturally belong to the adjacency of the territory of the State to its navigable waters. (Page 521.)

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"It is clear that the cost of the work and the value of the land in its altered condition are not easy of estimation; it is certain many enterprises of a similar character have proved abortive and have brought great losses upon the projectors; and it is enough, therefore, to say that the property-owner cannot, without his consent, be made

a party in the hazards of such an enterprise. If the assessment to which he is subjected had been restricted so as not to exceed the benefits received by him, he would have run no risk, because he would not have suffered any loss; but as this law is framed, his land may be taken from him, if the expenses of the project require the sacrifice. This, as has been already stated, would be, in my opinion, equivalent to a condemnation of the land, without compensation, for the public benefit, and as this may result from the natural operation of the statute, I am compelled to conclude that it is unconstitutional and void. (Page 530.) * * * That principle is one of great importance; for if burdens of the community can be thrown upon a small class, whose position is not peculiar or different from the rest of the people, there can be no security for private possessions. To permit individuals to be taxed to pay for public improvements to the extent of the peculiar benefit which they receive from such improvement is not unjust or inequitable; but any exactions beyond this, exclusively from such individuals, is an act which involves the ability on the part of the community
185 to confiscate for its own purposes the property of the citizen. * * * Before closing this subject it should be remarked that this case, with regard to the grounds on which it rests, is to be distinguished from that class of proceedings by which meadows and other lands are drained on application of land-owners themselves, * * * whereby the owners of the meadow lands are compelled to submit to an equal burden of the expense incurred in their improvement, are rules of police of the same character as provisions concerning party walls and partition fences."

Thus it will be seen that peculiar facts and circumstances controlled this case, and the case was treated as a case of eminent domain, as a compulsory sale to the State—perhaps, more correctly speaking, a compulsory proceeding to change the condition of this land for the benefit of the public—for it is clear that the Government has not the right to go on my premises, fill or drain it for my sole benefit. The change sought can only be wrought when there is some police power authorizing the legislature to act for the benefit of the community at large, not my sole benefit, and the right to assess me benefits is as a member of the community.

The courts universally hold that frontage assessments are not valid in rural districts (Elliot, Roads & Streets, p. 394), but are valid in cities and towns. New Jersey holds that a statute levying one-third of the assessment for the construction of a walk upon the opposite side of the street is valid, upon the ground that sidewalks are local improvements, from which the property-owner derives a corresponding benefit equivalent to the assessment, clearly showing that the
186 court distinguishes between eminent domain and assessments. In the Coster case the court clearly holds the act under consideration eminent domain, where there must be an opportunity to be heard on the question of right to take the land and drain it, and that in order to exercise this right the drainage must be a matter of public utility, as distinguished from personal advantage to the owner of the land drained. As I have shown, if it is only a matter of personal advan-

tage to the owner, the State has no right to drain. If it is a matter of public benefit to the general community, which alone will authorize the act, then the property-owner has as to his land, after it is drained, no different benefits from what the balance of the community effected, which made the drainage legal and a matter of public utility. Therefore, in order to drain this land, other property besides the drained land must be benefited, thereby authorizing the legislature to condemn whatever interest in the swamp land under the police power as is beneficial to the public. Therefore the whole beneficial interest must bear the burden. The court clearly illustrates the legal principles involved in the case when they declare that the act would be a condemnation of the land without compensation, and therefore unconstitutional and void. (Page 529.) All the cases cited in the Coster case are street-opening cases, where the rules of law applicable to eminent domain apply. In the case of improvements *prima facie*, the adjacent land is benefited, and the assessment is paid by the abutter as a contribution for public purposes. The other case of eminent domain is really the case
187 of compulsory sale to the Government, and may or may not be beneficial to the adjacent property. In the one case it is a matter of legislative discretion and is not reviewable by the courts.

Davidson *v.* New Orleans, 96 U. S. 97.
Spencer *v.* Merchant, 125 U. S. 345.
Walston *v.* Nevin, 128 U. S. 578.
Stanley *v.* Supervisors, 121 U. S. 535–550.
Hagar *v.* Reclamation Dist., 111 U. S. 701.
Fallbrook *v.* Bradley, 164 U. S. 112.

In the other case *prima facie* the taking of private property is not beneficial to the owner, and compensation must be made or secured by the public and not by the balance of the owner's land.

Norwood *v.* Baker, 172 U. S. 269–277.

For the opening of the street is solely for public purposes, the drainage of the land is likewise solely for public purposes; in either case the legislature cannot authorize the taking of the land without securing to the owner just compensation, and where, as in the Norwood and Coster cases no provisions are made for paying the excess of damages over any special benefit accruing to the abutting property or the drained land, the court holds is the taking of private property without due process of law. In the Norwood case there would have been an entirely different question presented had the assessment been for $2,000 for improving the street. Therefore, what does the case of Norwood *v.* Baker decide?

Briefly this case is: A woman owned a tract of land in
188 Norwood, O. The village, by proceedings based upon the right of eminent domain, took a strip of this land for a street. This was all the land which was taken. By the constitution of Ohio the jury cannot, after assessing damages for the taking, as with us, consume them by deducting benefits which the jury may suppose the rest of the ground to receive by the proposed improvement.

The jury allowed the woman $2,000, and she was paid. The ordinance upon which the proceedings were based provided as follows: "The cost and expense of the condemnation of the property, including compensation paid to the owners, the cost of the condemnation proceedings, the cost of advertising, and all other costs and the interest on bonds issued, if any, should be assessed per front foot upon the property bounding and abutting on that part of Ivanhoe avenue as condemned." Afterwards the council arbitrarily assessed against her ground which was not taken the sum of $2,218.58, solely because a part had been taken. She had neither a hearing nor a chance to be heard, and such a hearing would have been a farce, because by the terms of the ordinance the ground could not escape the assessment for this amount even if it was not benefited at all. So we observe the woman's land was taken away from her, and she was made to pay $218.58 for the privilege of losing it. Inasmuch as her ground alone was taken there could have been no question as to benefits to her land from other ground condemned at the same time. It must also be borne in mind that under these proceedings not only is the owner allowed the value of the ground taken, but also damages, if any, to the rest of the ground by the taking.

189 It is true, of course, that the assessment of benefits and the taking of the land — by virtue of different powers, the former by virtue of the taxing power, while the latter is in the nature of a forced sale to the public. The Ohio constitution was so drawn as to prevent a jury from paying the owner of the land taken with speculative benefits to the rest of the ground owned by him, and one cannot shut his eyes to the fact the ordinance was so drawn in the Norwood case as to invade this feature of the Ohio constitution. The taking of the ground, the payment for the same, and the assessment of benefits on account thereof, were all under and by virtue of one ordinance. The village, by the ordinance, gives the owner the value of her ground taken, for she will get nothing anyway, as it will assess the sum allowed her against the rest of her ground, no matter what that sum may be. If this ordinance is valid, then a city may be given the power arbitrarily to say in advance, in this kind of a case, "we will take your land, allow you nothing for it, and make you pay the costs besides."

It is such a case as this that was passed upon in Norwood *v.* Baker. It can be readily seen that such an one is not at all like a case where a sidewalk is built or a street paved in front of a lot, and any language used in the Norwood opinion so general as to apply to the latter kind of a case, is simply an "*obiter dictum*." No court has expressed itself more strongly on this point than the United States Supreme Court, in Parsons *v.* District of Columbia, 170 U. S. 51, where it is said: "It is trite to say that general principles announced by courts which are perfectly sound expressions of the law under

190 the facts of a particular case may be wholly inapplicable in another and different case, and there is scarcely any department of the law in which it is easier to collect one body of decisions and contrast them with another in apparent conflict than that which deals with the taxing and police powers."

Since the case of King *v.* Portland, 2 Or., 147, decided in 1866, assessments wholly against the ground directly benefited, to pay for paving streets, building sidewalks, sewers, etc., have been held valid by our supreme court. During a period of nearly forty years they have been attacked again and again by the ablest lawyers of this State, until tax bills, issued as our city issues them, are bought and sold in the market like municipal bonds. Intrenched behind a legal principle so old, and developed with such care and by such skillful workmen, it does seem to me that we would at least subject ourselves to criticism if we were stampeded by an "*obiter dictum.*"

The United States Supreme Court may hold our way of assessing taxes for improvements illegal, but I do not think so. The opinions of that court show that it has always been very conservative. It has been slow to disturb the machinery by which a State collects its taxes. It has never been eager to hold State laws unconstitutional, and where it has doubted, it has given the law the benefit of the doubt and held it valid. It has always treated the decisions of a State supreme court with respect, and has not been keen to overrule them. I can see no reason why it should make our decisions on this subject an exception.

191 In fact, on this very subject the court has emphatically expressed itself in Billingham & Co. *v.* New Whatcom, 172 U. S., 320, decided since the Norwood case, where it says: "Before proceedings for the collection of taxes sanctioned by the supreme court are stricken down in this court, it must clearly appear that some of the fundamental guarantees of right contained in the Federal Constitution have been invaded."

Again, in Bells & Co. R. R. *v.* Pa., 134 U. S., 237, the court said: "We think we are safe in saying that the fourteenth amendment was not intended to compel the State to adopt an iron rule of equal taxation."

The opinion in Norwood *v.* Baker states the case by a question. After saying that the matter of benefits could have been settled in the condemnation proceedings, by deducting them from the sum allowed to the owner, had it not been for the Ohio constitution, the court says: "But does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street?"

The fifth amendment to the Federal Constitution contains this clause: "Nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." This was a limitation upon the powers of the Federal Government. The fourteenth amendment de-

192 clares, among other things, "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Our State constitution on this subject goes further than the Federal, for it says: "That private property shall not be

taken * * * for public use without just compensation." So that when our supreme court passed upon the validity of these assessments, it must have passed upon the constitutional limitations on this subject, and the only protection added by the fourteenth amendment is to give the Federal courts jurisdiction in this class of cases, thereby making the United States Supreme Court the final arbiter instead of the supreme court of the State.

In the Norwood case the court says: "It has been adjudged that due process of law prescribed by the fourteenth amendment requires compensation to be made or secured to the owner when private property is taken by a State or under its authority, for public use." And the vice of the ordinance passed upon in that case was that it not only did not require compensation to be made, but made compensation impossible. The opinion of the judge of the circuit court in the Norwood case, from which court it went to the supreme court, briefly disposed of the case by saying: "Granting, for the sake of argument, that where property is appropriated for a street, the compensation to the owners and the expense of making the appropriation may be assessed upon the several owners, each bearing his proper share, quite a different question is presented when, as here, a municipality undertakes to appropriate to public use the real estate of a single owner for a public street, and then
193 assess back upon him, not only the compensation awarded for the entire street, but also all expenses of the proceedings. If such a proceeding is not taking for public use without compensation, I am at a loss to know what would constitute such a taking." * * * This whole subject was considered by Judge Jackson in Scott *v.* Toledo (1888), 36 Fed. R. 385.

So, then, there is nothing new in the doctrine laid down in the Norwood case: the novelty consists in applying it to a system of special taxation like ours, which the United States Supreme Court has done. Poulson *v.* Portland, *supra*. In Williams *v.* Eggleston, 170 U. S. (1897), 311, the court says: "Neither can it be doubted that the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory, or permit a hearing before itself, one of its committees or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited."

The Supreme Court of the United States in this case of Norwood *v.* Baker has thus distinctly held that it is contrary to the fourteenth amendment to the Constitution of the United States for a State or a municipality within a State, to assess the cost of laying out a public street (including the cost of the land taken for that purpose) by the front foot, upon the land bounding and abutting upon such public street.

194 Assessments are made under the taxing power. This is stated by the court in Norwood *v.* Baker (p. 277):

"But the assessment of the abutting property for the cost and ex-

pense incurred by the village was an exercise of the power of taxation."

So also Judge Cooley says:

"That these assessments are an exercise of the taxing power has over and over again been affirmed, until the controversy must be regarded closed," citing a large number of authorities.

Cooley on Taxation, 2d ed., p. 623. See also to the same effect, Dillon on Municipal Corporations, 4th ed. 752.

It can hardly be supposed that the fourteenth amendment to the Constitution of the United States requires that all State taxes be levied only according to benefits received, and not in excess of benefits received, by the person or thing taxed, nor that an equal compensation for every tax levied. The Supreme Court has not so decided. And such rule would render invalid all the ordinary ad valorem taxes as well as many others. Obviously, if any such rule of *quid pro quo* is to be applied in the case of assessments as distinguished from other taxes generally, there must be some distinction or line of demarcation between assessments and other taxes, and the fourteenth amendment to the Constitution of the United States must somehow make such distinction and line of demarcation.

A tax may be defined as a payment or a contribution re-
195 quired by the Government for public purposes. This definition is intended to include, and does include, an assessment, as well as any other tax. Worcester defines tax as follows:

"A sum imposed or levied by the Government or other authority; a rate; a duty; an excise; an impost; an assessment; a custom."

While Worcester's definition is correct, yet under our system of government a tax must be made for public purposes.

The taxing power necessarily involves and includes among other things the power of apportionment, that is, the power to choose the persons or things to be taxed, and to prescribe what amount or share each shall pay, or according to what rule or measure the amount or share to be paid by each shall be determined. It would be idle for a legislative body to say that so many dollars tax be paid to the Government, unless it also went further and prescribed what persons or things should pay the same, and in what amounts or according to what measure or rule. "Taxes cannot be laid without apportionment." People *v.* Brooklyn, 4 N. Y. 419, 427. Ladd *v.* Gambell, 35 Or. 393.

It has been decided in numerous cases in the Supreme Court of the United States that the matter of the creation and dissolution of municipalities or political subdivisions of the State is a matter solely for the constitution and the statutes of the States. See Missouri *v.* Lewis, 101 U. S. 22, and Detroit *v.* Osbourne, 135 U. S. 492. Poulson *v.* Portland, 139 U. S. 30, 37.

State governments, in the exercise of their proper functions,
196 cannot be interfered with by the Federal Government. One of these functions is the creation and control of municipalities or subdivisions of the State for the purpose of carrying on the State government. Such subdivisions of the State are, so far as the Federal

Government is concerned, mere agencies of the State. As the Federal Government cannot interfere with a State in the proper exercise of its functions, so it cannot interfere with these subdivisions and agencies of the State. For this reason the Federal Government cannot even tax such subdivisions or agencies or their bonds or other obligations. Pollock *v.* Farmers' Loan & Trust Co., 157 U. S., 429, 583, 586, and cases there cited; S. C. on rehearing, 158 U. S., 601. Much less can the Federal Government interfere with the creation and dissolution of such subdivisions or agencies. Obviously, therefore, the definition of "assessment," on which certain New Jersey cases rest, when applied to the word assessment in the rule laid down by the Supreme Court in Norwood *v.* Baker, makes any supposed requirement of the fourteenth amendment that assessments cannot be in excess of benefits an illusory requirement, and one which can be circumvented and evaded by the States by the mere act of creating new and different municipalities or political subdivisions of the State. Furthermore, as far as the fourteenth amendment is concerned, it will not help the definition any to say (as some of the New Jersey decisions do as a matter of State law, which we need not criticise) that an assessment is a contribution levied in any previously created political subdivision of the State on any real estate less than the whole of the real estate in such previously created politi-

197 cal subdivision; for all that the legislature of the State would need to do in that event in order to evade the supposed requirement of the fourteenth amendment would be first to create a new political subdivision, and then by a statute enacted a few days later make provision for the levy of an assessment or tax therein on some other basis than according to benefits, as, for example, according to front foot, value, or area. The customary and orderly procedure of the legislatures of the States is to make in the very statute creating a political subdivision full and adequate provision for taxes and assessments for the government and administration of the same and the performance of its functions. And doctrine under the fourteenth amendment which involves the proposition that the power to levy assessments cannot be conferred upon a political subdivision, but must be in some later act, would certainly be strange and novel. So, also, it is immaterial that the functions of the subdivision or taxing district of the State be many or few. This is a matter for the State legislative body to determine, subject to only such restrictions as the State constitution may impose. Furthermore, it would be idle for the Supreme Court of the United States to make any definition of assessment for the purposes of the fourteenth amendment based upon the distinction whether the taxes are levied upon the property in an entire political subdivision of the State, or only in a part of such political subdivision, without at the same time defining and stating what is meant by a political subdivision. It would be necessary, moreover, in order to have any such definition effective, that such subdivision be not subject to change at the will of the State.

198 The principles on which the clause as to due process of law in the fourteenth amendment of the Constitution of the

United States should be construed are well stated by the Supreme Court in Mattox *v.* United States, 156 U. S. 237. In that case it was held that the provision of the Constitution which required that the accused shall "be confronted with the witnesses against him" was not violated by permitting the testimony of witnesses sworn upon a former trial to be read against him. Mr. Justice Brown, giving the opinion of the court, said (page 243):

In Maxwell *v.* Dow, 176 U. S. 581, in speaking of the case of Hustado *v.* California, 110 U. S. 516, at page 584: "This decision could not have been arrived at if a citizen of the United States were entitled by virtue of that clause of the fourteenth amendment relating to the privileges and immunities of citizens of the United States to claim in a State court that he could not be prosecuted for an infamous crime unless upon an indictment by a grand jury. In a Federal court no person can be held to answer for a capital or otherwise infamous crime unless by indictment by a grand jury, with the exceptions stated in the fifth amendment. Yet this amendment was held in the Hustado case not to apply to a prosecution for murder in a State court pursuant to a State law." Judge Harlan dissented, and cited Norwood *v.* Baker as supporting his position that the fourteenth amendment to the Constitution placed the same restrictions on the States that had formerly been imposed upon the General Government, pp. 614–615. But the balance of the Supreme
199 Court placed Norwood *v.* Baker along by the side of Chicago, Burlington R'y *v.* Chicago, 166 U. S. 226–231, and held that the amendment forbids the taking of private property for public use without making or securing just compensation. (Page 614.)

Judge Ruggles, giving the opinion of the New York court of appeals in the well-known leading case of People *v.* Brooklyn, 4 N. Y. 419, speaking of "those clauses in the constitution (New York) which declare that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation," says (page 423): "Neither of these prohibitions applies to taxation." This language of the learned judge was used with reference to the question of the power of the legislature to tax including the power to apportion the tax. This is not stating that the words "due process of law" in the fourteenth amendment, or in similar provisions in the State constitutions, do not or may not apply to proceedings for enforcing the payment of a tax, such as action in the courts to obtain judgment for a tax and proceedings for the collection of the same, the seizure and sale of property to satisfy the tax, or the arrest and imprisonment of the person with a view to enforcing payment. Such proceedings may be in some instances judicial in their nature and may require notice, hearing and judicial decision. But even as to some of such proceedings summary seizure under a warrant does not violate the due process of law required by the fifth amendment to the Constitution of the United States, or by the fourteenth amendment.
200 Murray's Lessee *v.* Hoboken, etc., Land Co., 18 How. 272; McMillen *v.* Anderson, 95 U. S. 37, and cases cited. See also Judge Cooley's opinion in Weimer *v.* Bunbury, 30 Mich. 201 (1874).

Historically, then, it seems clear that the words "due process of law" found in the fourteenth amendment have no reference to the exercise of the power to tax, including the power to apportion taxes. The protection against unfair or excessive taxation is found in those parts of the constitutions of the several States and of the United States, which assure a representative government, that is, a government in which the legislators are elected by the people. The historic requirement that there shall be no taxation without representation is thus fully satisfied. It is not the proper course for the people to wait supinely until after the legislative body of the State or of any municipal subdivision of the State has imposed unfair or excessive taxes, and then, in order to prevent the taxes being levied and apportioned on the bases prescribed by the legislative body, appeal to the protection of the Supreme Court of the United States, instead of electing proper legislators and appealing to the legislative body. Such conduct would proceed upon the theory that proper legislators cannot be elected, and that the legislative bodies cannot be trusted, and cannot even be properly influenced by the people, in the matter of the levy and apportionment of taxes, but that the United States courts, and especially the Supreme Court, constitute the protection of the citizen against unfair or oppressive taxation.

This theory or assumption is not, however, in accordance with
201 the history and spirit of our Government and institutions, and it is not supported by the facts. The people of our country can be trusted. The citizens of our States as well as the members of legislative bodies of our State are, as a rule, naturally fair-minded, and it is not generally true that an appeal to them which is just is disregarded. There may be from time to time differences of opinion, but generally and in the long run a cause or an appeal that is in itself right commends itself to the citizens and the legislators and is bound to succeed. If this be not so, and if the legislators of the country, or if the citizens of the country who ultimately are responsible for the kind of legislators who are elected, cannot be trusted to deal fairly and justly in the matter of the levy and apportionment of taxes, then our democratic government is in this important respect a failure. But the conclusion that it is such failure would prove too much, for it must be obvious that in the last analysis the Constitution and the Supreme Court itself are under the control of the citizens, and if they persistently desire the enactment of any particular legislation or the adoption of any particular policy on the part of the Government, they have the power in the long run to have such legislation or policy adopted. There is no ultimate check but the people themselves. Accordingly, we find that the courts have declined to interfere with the levy and apportionment of taxes by the legislative bodies, and have frequently stated that the proper remedy for unfair or excessive taxation is to appeal to the legislative bodies and to elect better men, if necessary, as legislators. Thus, Chief Justice Marshall, in Providence
202 Bank *v.* Billings, 4 Pet. 514, in a tax case on writ of error to the supreme court of Rhode Island, says (p. 563):

"However absolute the right of an individual may be, it is still

in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally. This principle was laid down in the case of McCulloh *v.* The State of Maryland, 4 W. 316, and in Osborn *et al. v.* The Bank of the United States, 9 W. 738."

In the case of The County of Mobile *v.* Kimball, 102 U. S. 691, the question was whether a tax to pay bonds for the improvement of the river, bay and harbor of Mobile, levied solely upon the county of Mobile, and not at all upon the rest of the State of Alabama, which it was conceded would derive some benefit from the improvement, was a taking of property without due process of law. Mr. Justice Field, giving the opinion of the Supreme Court, says (p. 704):

"It may be that the act imposing upon the county of Mobile the entire burden of improving the river, bay and harbor of Mobile is harsh and oppressive, and that it would have been more just
203 to the people of the county if the legislature had apportioned the expenses of the improvement which was to benefit the whole State, among all its counties. But this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive State legislation. The judicial power of the Federal Government can only be invoked when some right under the Constitution, laws or treaties of the United States is invaded. In all other cases the only remedy for the evils complained of rests with the people and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests."

In Hager *v.* Reclamation District, 111 U. S. 755, the court, speaking of special assessments for building levees, said: "The expense of such works may be charged against parties specially benefited, and be made a lien upon the property. All that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to benefit received. Absolute equality in imposing them may not be reached; only an approximation to it may be attainable. If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that to some extent inequalities may arise. * * * As we said in Louisiana *v.* Pillsbury, 105 U. S. 278, there would often be manifest injustice in subjecting the whole property of any district to taxation for an improvement of a local character. The rule that he who reaps the benefit should bear the burden must in such cases be applied."

204 In Spencer *v.* Merchant, 125 U. S. 355, the court said: "The legislature, in the exercise of its powers of taxation, has the right to direct the whole or part of the expense of a public

improvement, such as laying out, grading or repairing a street, to be assessed upon the owners of the lands benefited thereby, and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative direction." Again, page 356: "But the legislature has the power to determine, by the statute imposing the tax, what lands which might be benefited by the improvement are, in fact, benefited; and, if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether the lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited."

In Illinois Central Railroad *v.* Decatur, 147 U. S. 190, an assessment for grading and paving a street in Decatur was made against the right of way of a railroad. By its charter the road was exempted from taxation, by reason of its paying to the State a certain part of its gross income. The assessment was held valid. The opinion quotes from the decisions of the supreme court of Illinois, which held valid the front-foot rule, and announced the doctrine that where a city, with authority by its charter so to do, determined that the improvement in front of a lot should be paid for according to its frontage, that then such action of the city was final and could "neither be disputed nor disproved."

205 Parsons *v.* District of Columbia, 170 U. S. 45, goes further in upholding benefit assessments than the Oregon supreme court has ever gone. Under authority of law the District passed an ordinance laying water mains upon a street, and in it prescribed that each front foot, on both sides of the street, should be assessed at the rate of $1.25, and this, too, when the actual cost to the District was but $1.50 per foot of pipe. The Supreme Court held these assessments valid. The opinion quotes with approval Dillon on "Municipal Corporations," where it says: "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch for the taxing power, or included within it. * * * Whether the expense of making such improvements shall be paid out of the general treasury or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all the property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lot, is, according to the present weight of authority, considered to be a question of legislative expediency." The court also says "that the power to assess and collect these assessments should not be purely arbitrary and unregulated."

In Hager *v.* Reclamation District, before referred to, a party whose lands were assessed claimed that the constitution has been violated, but the court did not agree with him, saying: "But assessments in California for the purpose of reclaiming overflowed and
206 swamp land can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the taxpayer and opportunity be afforded him to be heard respecting the

assessment. In them he may set forth, by way of defense, all his grievances." And on page 709 the court, speaking of the owner having no chance to be heard upon matters upon which, if he was heard, could not be changed, says: "Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of judicial nature, and nothing could be changed by hearing the tax-payer. No right of his is, therefore, invaded."

The defendant cannot show, it is true, that the adjacent-property rule is unjust or improper, because that is not a judicial but a legislative question.

As was said by Justice Peckham, in Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, at page 174: "In the act under consideration, however, the establishment of its boundaries and the purposes for which the district is created, if it be finally organized by reason of the approving vote of the people, will almost necessarily be followed by and result in an assessment upon all the lands included within the boundaries of the district. The legislature thus in substance provides for the creation not alone of a public corporation, but of a taxing district whose boundaries are fixed, not by the legislature, but after a hearing, by the board of supervisors, subject to the final approval by the people in an election called for that purpose. It has been held in this court that the legislature has
207 power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed apportionment of the tax, *i. e.*, the amount of the tax which he is to pay. Paulsen *v.* Portland, 149 U. S. 30, 41. But when, as in this case, the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself, the land-owner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions in this court in Spencer *v.* Merchant, 125 U. S. 345, 356, and Walston *v.* Nevin, 128 U. S. 578. Such a hearing upon notice is duly provided for in the act. * * * Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be
208 assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not suscept-

ible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an ad valorem method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law.

"In the case of Davidson *v.* New Orleans, *supra*, the assessment, with which this court refused to interfere, was for a local improvement (reclaiming swamp lands), and by section 8 of the act of the legislature of Louisiana, passed in 1858, Laws of Louisiana, 1858, 114, such an uniform assessment was levied upon 'the superficial or square foot of lands situate within the draining section or district of such board' as would pay for the cost of construction. The effect of this provision was that each foot of land in the whole dis-
209 trict paid the same sum as any other foot, although the assessment was founded upon the theory of an assessment for benefits. It was complained that the amount assessed upon plaintiff's lands was excessive, and that part of them received no benefit at all, and it was to that argument that the reply was made that it was a matter of detail so far as this court was concerned, *i. e.*, it was not a constitutional question, and therefore was not reviewable here. 96 U. S., at page 106.

"In Walston *v.* Nevin, 128 U. S. 578, an assessment was laid upon lands for benefits received from construction of a local improvement, according to the number of square feet owned by the landowner. It was urged that it was not an assessment governed by the amount of benefits received, but was an absolutely arbitrary and illegal method of assessment. This court held the objection not well founded, and that the matter was for the decision of the legislature, to which body the discretion was committed of providing for payment of the improvement.

"We refer to the case of Cleveland *v.* Tripp, 13 R. I. 59, decided in 1880, as one which treats this subject with much ability. The act provided for the construction of a sewer in the city of Providence, and directed the laying of an assessment upon the abutting lands of a certain sum for each front foot, and another sum for each square foot extending back 150 feet. The claim was made that such a mode of assessment did not apply the tax in proportion to the benefits received, and was unequal and unfair, and therefore unconstitutional. The court, while admitting the complaints of
210 inequality to be well founded, yet held the act to be within the power of the legislature.

"There are some States where assessments under such circumstances as here exist and made upon an ad valorem basis have been held invalid, as an infringement of some provision of the State constitution, or in violation of the act under which they were levied. Counsel have cited several such in the briefs herein filed. We do not discover, and our attention has not been called to any case in this court where such an assessment has been held to violate any provision of the Federal Constitution. If it do not, this court can grant no relief.

"The method of assessment here provided for may not be the best which could be adopted in order to accomplish the most equal and exact justice which the nature of the case permits. But none the less we are unable to say that it runs counter to any provision of the Federal Constitution, and we must for that reason hold the objection here considered to be untenable."

In Railway *v.* Matthews, 174 U. S. 96–106, the Supreme Court has held that the idea of classification of property for the purpose of assessment is that of inequality and the fact of inequality in no manner determines the matter of constitutionality. To the same effect is the rule adopted by our own court in the case of Ladd *v.* Gambell, *supra*, wherein the court say: "Perfect equity in such an assessment is hardly attainable, and an approximation is all that can be reasonably expected, * * * and the fact that the legislature, in the exercise of its wisdom, has seen proper to divide the property-
211 owners into classes, according to the amount of their respective assessments, and provide a method of payment, equal and uniform in each of the several classes, do- not, in our opinion, render the act void. Force and effect must be given to the legislative will in this respect." Citing cases.

We have an apt illustration of the principle in the case of Sears *v.* Boston, 1st Municipal Cases, page 497, where, under the statute of that State the board of aldermen of the city of Boston were authorized to assess the cost of sprinkling a street upon the adjacent property, and they took up the Village of Norwood case and discussed it and say that a legal assessment for an amount in substantial excess of the benefit received is in violation of the fourteenth amendment inasmuch as it would deprive one of his property without compensation, and so without due process of law; and say that this is the principle that has often been stated by this court, meaning the court of Massachusetts, and leads to the same result, and that the right to apportion public burdens on cities, towns and counties, as the legislature deems reasonable in reference to benefits, and to their consideration, which are not capable of exact estimate in money, is within the power of the legislature, and is the same as the right to impose and levy taxes upon individuals. And they say while these assessments must be founded upon benefits, the courts have generally recognized the difficulty, and in many cases, the impracticability of attempting to estimate benefits to estates, one by one, and without some rule or principle of general application which will make the assessment reasonable and appor-

tioned according to the benefits. Accordingly the determination of said rule or principle by the legislature itself, or by the tribunal appointed by the legislature to make the assessment, has commonly been upheld by the courts. If, however, it is further planned to make an assessment upon an estate substantially in cases of benefits in relation to its said estate, as in Weed *v.* Boston, 171 Mass., 51 N. E. 204, and in the case of Village of Norwood *v.* Baker, and that the assessment of special taxes by an assessment of particular benefits on each lot by measurement of frontage, or by measurement of area of the lots, or by valuation of the property, have all been sustained.

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But perfect equality in the distribution of public burdens is not tenable.

Sears *v.* Boston, *supra.*

This same court almost immediately afterwards considered another case where the same parties were interested in Sears *v.* Boston, 2d Municipal Reports, 184, wherein the city officers of the city of Boston undertook to collect an assessment of the property adjacent to the sewer under the theory that it was a special benefit to this property to have it maintained.

The law provided that the officers of the city of Boston should annually determine just and equitable sewerage charges to be paid by estates in said city for the construction, maintenance and operation of sewerage works, taking into consideration in determining the charges the necessity of the work, as caused by each estate; the amount of use thereof, if any, by the estate or its occupants; lapse of time since payment and use, if any, and such other matters as shall be just and proper. When this determination had been made, the officers were required to make returns to the tax collector, who was to include it in the return for the current year and collect it as part of the taxes against the estate.

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Sears contended that these provisions of the statutes were unconstitutional.

The court says, page 186: "It is evident that these provisions cannot stand, as authorizing an assessment of a general tax, because the assessment called for is not proportional and equal. The statute not only directs an assessment upon a particular class of property, instead of on all taxable property, but it expressly requires, in determining the charges, THE CONSIDERATION OF FACTS PERTAINING TO PARTICULAR ESTATES IN THEIR RELATION TO THE CHARGES AND TO PREVIOUS ASSESSMENTS (capitalized by writer), which prevent the making of proportional assessments, viewing it as a general tax, AND NOT AS AN ASSESSMENT OF BENEFITS. If the determination of these charges is a local and special assessment upon particular estates, we have to consider the principles on which such taxation is founded. It is well established that taxation of this kind is permissible under the constitution of this Commonwealth, and under the Constitution of the United States, only when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid." Citing various cases.

And then the court adds: "Thus, those statutes prescribe the taxes on these estates for special and peculiar benefits only,
214 or those purported to authorize taxation on other grounds than special benefits and for amounts larger than the amounts of such benefits."

And further says, in answering this question: "The benefits to be considered in taxing each estate are not, in terms, those that are special and peculiar, but, so far as the language goes, may be those that it received in common with the other estates in the city, and with the inhabitants generally. The fact that the charges to be determined are for the construction, maintenance and operation of the sewerage works of THE WHOLE CITY GIVES SOME FORCE TO THE POSSIBILITY OF A CONSTRUCTION WHICH INCLUDES ALL BENEFITS; but, whether this construction should be adopted or not, the charges may be determined on any ground which the street commissioners deem just and proper, and may not be founded in any great degree, if at all, upon special and peculiar benefits, and may in any particular case largely exceed such benefits."

It will thus be seen that in these two cases the same court, distinguished for its learning and ability, has given a construction to the case of Norwood *v.* Baker. The minority of the court in the case of Norwood *v.* Baker contended that the decision of the majority of the court was an attack upon the right of a legislator to levy an assessment upon adjacent properties for an improvement, and overruled a long line of cases similar to the case of Spencer *v.* Merchant, *supra.*

But the Supreme Court say that they do not overrule the case of Spencer *v.* Merchant, and that is not their holding. But applying
215 the rule of construction as to constitutional provisions to the fact, as disclosed in this particular case, justified the court in saying that the authority attempted to be exercised by the village of Norwood was unconstitutional and void, and proceeded to cite cases from a number of States to sustain the contention that where a law of itself was so framed that one must see that the property was going to be assessed, in addition to its benefits, it was unconstitutional and void.

The two Massachusetts cases, *supra*, aptly illustrate the distinction between the two rules. In one they were authorized to take into consideration, in making the assessment, matters that were clearly not special benefits and could not be special benefits from the very nature of the thing. And in the other, while the court says that the sprinkling of the streets is undoubtedly a benefit to adjacent lots in the way of increasing the rental value for use, and that the court can in one part of the city assess it as a general tax and in another part as a special assessment, that the rule adopted by statute for making the assessment, so long as it does not include any matter that is not a subject of special benefits, they will not disturb the law.

In the case of The Village of Norwood *v.* Baker, the trustees of the village found that damages to the property were $2,000. They also found that the benefit to the property was $2,000. But the law pro-

vided that in addition to assessing the benefits they were authorized to assess the cost of opening the street. In other words, the village not only undertook to compel the man "to pay all benefits that they themselves declared had accrued to his adjacent property, but in addition to that the cost
216 and expenses of the village in ascertaining what these benefits were. This was clearly a case of flagrant outrage upon the rights of a citizen. They not only undertook to secure from him the benefits that resulted from the opening of the street, but undertook to impose upon him the burden which the public had incurred in ascertaining what his benefits were. And the court did not undertake to say that an assessment by the front foot, or upon the adjacent property, or by the judicial determination of benefit of property, was unconstitutional and void. For the right to assess adjacent property with a given improvement had been directly challenged in the case of Mattingly *v.* District, *supra*, wherein Congress directed the Commissioners of the District of Columbia to levy an assessment at $1.25 per front foot for the construction of a sewer, and the assessment was directly challenged on the ground that it was not due process of law, and of an unequal burden not laid according to benefits. And the Supreme Court said that Congress had the right to make this assessment, and that such an assessment was legal and constitutional.

Suppose, in the case at bar, that discretion was left to the common council to ascertain what the benefits were that the adjacent property would sustain by reason of the improvement of this roadway, and have said that in addition to that they would bear the burden of some additional designated expenses. And, again, in the case of Norwood *v.* Baker, a burden was cast upon Baker that was not cast upon the other persons similarly situated in this suit, wherein in street-opening cases certain proceedings were necessary to be
217 had which under the statute the city was compelled to assess against the property in excess of benefits.

I understand that the courts make this distinction that they will not disturb an assessment, even though it is of doubtful propriety, unless the excess of assessment over benefits is definite and certain, or made so by law. And in the case of a street opening, where a man would have the voluntary right to dedicate to the public a street, it is very clear that under no circumstances could he be chargeable with benefit greater than the property right which he himself could deprive himself of, and that the fourteenth amendment to the Constitution was only intended to prohibit an arbitrary selection of property.

Barber *v.* Connolly, 113 U. S. 27; approved, 165 U. S., p. 182.

And further, that the fourteenth amendment is not designed to limit the subjects upon which the legislative power of the State may be exerted.

Railway *v.* Beckwith, 129 U. S. 26–29.

And that all the courts, both State and Federal, lay down the rule that the establishment, maintenance and control of streets is embraced within the powers and right granted by the fourteenth amendment to the Constitution, to the legislatures of the several States.

New Orleans *v.* Light Co., 115 U. S. 650 and cases cited.

And it is the province of the legislature to provide the nature and extent of local inequality to be adduced from a given state of
218 facts, and this creation of inequality by the legislature is but an illustration of the power of the legislature to classify it.

Jones *v.* Brinn, 165 U. S. 183.

Therefore, was the charter purely arbitrary, or has it some basis in that which has a reasonable relation to the objects sought to be accomplished? If the charter declaring that adjacent property should bear the burden of an improvement has a reasonable relation to the objects sought to be accomplished, it is clearly constitutional.

Railway *v.* Matthews, 174 U. S. 96–105 and authorities cited.

Therefore, if the Supreme Court of the United States has laid it down as a rule of law that the legislatures have the constitutional right to assess adjacent property for the full cost of an improvement, then and if such an act is not purely arbitrary, it has some basis which has a reasonable relation to the objects sought to be accomplished. And the court say, in

Railway *v.* Matthews, *supra:*

"The idea of classification is that of inequality, and the fact of inequality in no manner determines the matter of constitutionality."

It was said by this court in the case of Railway *v.* City of Portland, 25 Oregon, page 235:

"This delegation of power invests the municipal corporation with all the discretion the legislature possessed, hence it follows that the common council is clothed with the exclusive discretion in determining the necessity for and character of all street improve-
219 ments, and what property would be benefited thereby, and the amount of benefits conferred. These are questions of policy with which the legislature and its creature, the municipal corporation, the use, and the courts have no right to interfere, except in cases of fraud or oppression, or some wrong constituting a plain abuse of said discretion."

Elliott on Roads and Streets, 375.

Cooley on Taxation, 661.

"It is impossible for a council to fix with mathematical accuracy the amount of benefits that will inure to the property in consequence of a local improvement, but if it appears that it has exercised an honest discretion in determining this question of policy, it may have erred in a question of judgment, the remedy is at the polls in choosing a new council, and not for reviewing its proceedings in court."

In other words, the legislature, under the charter of 1898, selected the property which it declared to be benefited by any street improvement and only left to the common council the discretion of saying when public necessity required an improvement to be made. The legislature thereby selected the property, and the selection is a legislative one, not a judicial determination, and the courts of all the States and the Supreme Court of the United States have held that the power lies in the legislature, in the absence of constitutional restrictions in the State, to select its districts and declare the benefits. It is true that the legislature never contemplates that the officers that the people themselves elected will select a street
220 to be improved, and improve the same, at a cost out of all proportion to the benefits received, as did the common council in the case of California R. R. Co. *v.* Portland, *supra*, or as has been held in the numerous cases of sewers where the property was so physically situated that it could not drain into the sewer. But where property is directly benefited by the prosecution of such an enterprise, and the legislature has assessed what it deems a proportionate share of the cost upon the owner thereof, the courts are not authorized to institute an inquiry in order to ascertain whether or not the assessment exceeds the benefits, excepting in cases where charges are made and are included in assessments that are not the subject of special benefits, as in

Sears *v.* Board, 2d Mun. Reports, *supra*.
Village of Norwood *v.* Baker, *supra*.
Oregon & Cal. R. R. Co. *v.* Portland, *supra*.

But no such contention is made in the case at bar. In the case at bar all the plaintiffs attempt to do is, first, to attack the assessment on the ground that a more substantial repair was made than was actually needed to supply the immediate wants of the adjacent property-owners, and, finally, in the supreme court, a direct attack upon the methods of making assessments as absolutely unconstitutional and void.

And as I have undertaken to show to the court that all the cases hold that there is a wide difference between a tax or assessment prescribed by a legislative body, having authority over the subject, and one imposed by a municipal corporation acting under a limited and delegated authority.

221 For instance, in the case of Smith *v.* Minto, *supra*, this court held that in case of a dangerous street, that in order to make the repair it must in fact be dangerous. But the court does undertake to say that the legislature cannot declare a street unsafe and dangerous and direct certain officers to improve it and assess the cost thereof to the adjacent property. Therefore, what discretion in the last supposed case would be vested in the body who executed the law? None whatever. Then where does a discretion arise in the case at bar? The discretion arises in the attempt of the common council to judicially decide that this street is not safe and is dangerous to persons and teams passing thereon. And if, as a mat-

ter of fact, it is unsafe, then the council has acquired jurisdiction to order it repaired.

And if these appellants did not believe that the city had acquired jurisdiction to order this street repaired, or improved, it was their business to at once review or enjoin the proceedings. Why? Because the notice under which they proposed to improve declared that the city would assess the cost thereof against the adjacent property. No such steps or proceedings were taken or attempted. They remonstrated against the character of the repair, and the remonstrance was overruled. They then stood by and allowed the improvement to be proceeded with. The council acquired jurisdiction. Its next step required it to cause a notice to be published, calling for bids. The contract was awarded. The next step was a notice of the completion of the street and for parties to file their objections. They filed their objections and they were considered untenable by the
222 council. Therefore, the preliminary steps necessary to give the council jurisdiction were complied with, and being complied with, and the Constitution, as construed by the courts of the various States, have held that the assessment upon the frontage or adjacent property can be made, therefore, this assessment under no circumstances can be void, unless it is brought within the rule of Sears *v.* Boston, 2d Municipal Reports, *supra;* Norwood *v.* Baker, *supra*, or Oregon & California Railroad Co. *v.* Portland, *supra.*

And nowhere in their allegations in the complaint have they attempted to bring it within the rules as laid down by all the courts, that where the proof shows that the assessment is absolutely invalid upon equitable grounds, as in the case of The Oregon & California R. R. Co., *supra*, or where the law itself adds to the burden of the property-owner charges which, under the law, the city had charged, he must sustain, as in Village of Norwood *v.* Baker, *supra*, or selects as an expense that which is manifestly under the law an expense of the general municipal government.

Sears *v.* Boston, 2d Mun. Rep., *supra.*

As said by the supreme judicial court of Massachusetts, "The rule in the case of Norwood *v.* Baker is not a new rule, and is one that has been long considered by the courts."

As was said by Justice Harlan, in Henderson Bridge Co. *v.* City of Henderson, 1st Mun. Rep., p. 639, at p. 725:

"In determining a question of this character, the power to
223 tax existing, a judicial tribunal should not enter into a minute calculation as to the benefits and burdens, for the purpose of balancing the one against the other and ascertaining to what extent the burdens imposed are out of proportion to the benefits received. Exact equality and absolute justice in taxation are recognized by all as unattainable under any system of government. * * * There must be a palpable and flagrant departure from equality in the burden, as imposed upon the persons or property bound to contribute, or it must be palpable that persons or their property are subjected to a local burden for the benefit of others, or for the purposes in which they have no interest, and to which they are, there-

fore, not justly bound to contribute. The case must be one in which the operation of the power will be at first blush pronounced to be the taking of private property without compensation, and in which it is apparent that the burden is imposed without any view to the interest of the individual in the objects to be accomplished by it."

This decision was concurred in by a unanimous court and was subsequent in date to the case of Norwood *v.* Baker. To my mind, it clearly shows that the Supreme Court did not undertake to lay down any new or strange rules, as contended for by the appellants. But that the Supreme Court themselves were making the same applications that it made in the case of Spencer *v.* Merchant, *supra*, Hager *v.* Reclamation District, *supra*, and many other cases that are cited.

Courts never undertake to lay down rules of judicial construction as to what constitutes due process of law. But they apply principles when cases are presented.

224 And the very courts that Justice Harlan quotes from in Norwood *v.* Baker, in reference to the question of benefits, have all held, and are now holding, that it is within the power of the legislature to select and declare what district will be benefited by a given improvement.

The case of Barnes *v.* Dyer, 56 Vt. 364, cited in Village of Norwood case, sustaining the contention that the Ohio statute was unconstitutional and void, was a case where, under the act of the legislature, the city council was authorized to assess the owners of abutting property for a street improvement, "and so much of the expense thereof as they shall deem just and equitable." * * * And the phrase in the quotation was attacked as unconstitutional, and the court held that the language "as they shall deem just and equitable" fixed no definite standard by which the rights of the tax-payers were to be protected, as it was impossible from the terms implied to know upon what theory the council proceeded in determining what was equitable and just; whether it was in view of benefits bestowed, or upon the value of the land, or personal convenience to the owners, or of his ability to pay, or all combined, and then they say: "It is everywhere treated as a general constitutional principle that no member of society shall be compelled to contribute more than his proportion. Unless this is so there is no protection against arbitrary injustice in the imposition of taxes to secure this protection. Courts have held that legislative enactments must set up a standard, fix a rule to be conformed to as a guide in all cases, a uniform, certain rule, so far as reasonably practicable, and not susceptible to different applications between individuals of the

225 class to which it belongs. If the enactment fails in this regard it is deemed fatally defective. The proposition is sound, because it is an adherence to the fundamental principles which our constitutional government have designed to protect the individual against injustice and oppression." This proposition was what called forth the fourteenth amendment to the Constitution, and the Supreme Court of the United States, in construing this amendment, says: "That due process of law merely requires that all persons

subject to such legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed."

Brown *v.* New Jersey, 20 Supreme Court Rep. 77.

This is what the legislature has done in the case at bar. It has said that all improvements shall be paid for by the adjacent property and intersecting property, and every man knows what the rule is and the only question of discretion that is vested in the common council is the question of the necessity of a given improvement, and that, under the old charter and the present charter, could not be set in motion without a petition of a majority of the property-owners. They could decline to make the improvement, even when petitioned for, but they could not initiate it.

Take the case cited by the court of Bogart *v.* Elizabeth, 27 N. J. Eq. 568, where practically the same question as in Barnes *v.* Dyer, *supra*.

It seems to us that under the charter in force at the time this assessment was made that it was an eminently fair rule to adopt.

That each lot, or part thereof, within the limits of the pro-
226 posed street improvement shall be liable for the full cost of making the same upon the street in front of and abutting upon it for the proportionate share of the improvement and of intersections of two streets bounding the block. And so many courts of great respectability, including the Supreme Court of the United States, have held that the rule adopted by the legislature in this case was a reasonable rule, and was constitutional, and when assessments were levied according to this rule have been levied in a constitutional way. An individual is not entitled as a matter of right to have the question of degree of benefit to his property decided by a court.

Workman *v.* Worcester, 118 Mass. 168.
Keath *v.* Boston, 120 Mass. 612.
Railway *v.* Matthews, *supra*.
Irrigation Company *v.* Bradley, 164 U. S. 112.

Because exact equality between individuals is never attainable under any system.

Oregon & Cal. R. R. Co., *supra*.

And if the court undertakes to lay down a rule of exact equality it would find that it had entered upon a task that must necessarily result in endless confusion.

Neither has the case of Village of Norwood *v.* Baker given any sufficient reason why it is and how it is that the fourteenth amendment makes any such restriction upon the State legislative bodies as respects assessments. On the contrary, it has held as respects many taxes which the court itself has called assessments that the fourteenth amendment does not make any such restriction.

227 The only intimation of the court to the contrary is, I believe, the *obiter dictum* in the case of Norwood *v.* Baker, and such a

construction of that case cannot, I submit, be supported either on principle or by precedent.

The cases decided by the Supreme Court of the United States down to the case of Norwood *v.* Baker clearly hold that the fourteenth amendment to the Constitution of the United States does not prohibit assessments on real estate in excess of special benefits, or by methods other than according to special benefits. In the case of Davidson *v.* New Orleans, 96 U. S. 97 (on writ of error to the supreme court of Louisiana), the construction of the fourteenth amendment on this very point came before the court. The estate of John Davidson was assessed about $50,000 for draining certain swamp lands in the State of Louisiana. The assessment was levied in that case according to the superficial area or square feet of land within the drainage section, that is to say, each square foot in the drainage district paid as much as any other square foot. There was no inquiry in regard to benefits, and the assessment was not levied according to benefits. The rule of apportionment adopted necessarily excluded the consideration of benefits. Not only so, but in the record upon which that case was heard before the Supreme Court of the United States it was stipulated, among other things, that no drainage was done on plaintiff's land; that the whole assessment on the plaintiff's land amounted to about $50,000, of which $45,000 was assessed against one tract worth only from one-fourth to one-half that amount. This stipulation appears in the printed record on file in the office of the clerk of the Supreme Court at Wash-
228 ington. The question was thus clearly presented to the Supreme Court of the United States whether the fourteenth amendment prohibited such an assessment. If ever there was a case of an assessment being a hardship upon a person, it would certainly seem that this case of Davidson was one. The Supreme Court, however, after stating, among other things, that "there exists some strange misconception of the scope of this provision as found in the fourteenth amendment," said (p. 104):

"As contributing, to some extent, to this mode of determining what class of cases do not fall within its provisions, we lay down the following proposition, as applicable to the case before us:

"Whenever by the laws of a State, or by State authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

"It may violate some provision of the State constitution against unequal taxation; but the Federal Constitution imposes no restraint on the States in that regard."

Note the language: "Tax, assessment, servitude, or other burden."

No distinction is made as to assessments. Thus the Supreme
229 Court of the United States in the Davidson case expressly decided that that "class of cases" did not "fall within the provision" of the fourteenth amendment; in other words, that "the fourteenth amendment was not intended to cover, and did not cover, such a case;" that is, did not deal with the subject of the levy and apportionment of taxes. That the court meant to decide and did decide in this case of Davidson *v.* New Orleans that the fourteenth amendment does not require that taxes and assessments be levied according to benefits, or not in excess of benefits, is also evident from what the court says (p. 106):

"It is also said that part of the property of the plaintiff which was assessed is not benefited by the improvement. This is a matter of detail with which the court cannot interfere if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds."

In answer to the objection that some of Davidson's property had already been assessed for a similar improvement, the court said (p. 106):

"It is said that the plaintiff's property had been previously assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this, or which forbids unequal taxation by the States."

Observe the words "tax or assess" with no distinction. That the foregoing statement of the decision in Davidson *v.* New
230 Orleans is correct, and according to the understanding of the members of the Supreme Court, is evident from what they state in regard to this case in their decisions. For example, Mr. Justice Gray, giving the opinion of the court in the case of Spencer *v.* Merchant, 125 U. S. 345 (on writ of error to the supreme court of New York), says (p. 356):

"In Davidson *v.* New Orleans, it was held that, if the power was one which the State had authority to do, and to pay for by assessments on the property benefited, objections that the sum raised was exorbitant and that part of the property assessed was not benefited, presented no question under the fourteenth amendment upon which the court could review the decision of the State court (95 U. S., 100, 106)."

Observe the language of the court: "presented no question under the fourteenth amendment;" that is, the fourteenth amendment does not deal with question of levy or apportionment of taxes. So, also, Mr. Chief Justice Fuller, giving opinion of the court in the case of Walston *v.* Nevin, 128 U. S. 578 (on writ of error to the court of appeals of Kentucky), referring to the case of Davidson *v.* New Orleans, says (p. 582):

"And the conclusion was reached that neither the corporate agency by which work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value

of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that the personal judgments are rendered for the amount assessed, are matters in which State authorities
231 are controlled by the Federal Constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power (Spencer *v.* Merchant, 125 U. S. 345; Stanley *v.* Supervisors, 121 U. S. 533, 550; Mobile *v.* Kimball, 102 U. S. 691; Hager *v.* Reclamation District No. 108, 111 U. S. 701; United States *v.* Memphis, 97 U. S. 284; Laramie County *v.* Albany County, 92 U. S. 307). And whenever the law operates alike on all persons and property similarly, equal protection cannot be said to be denied (Wurts *v.* Hoagland, 114 U. S. 606; Railroad Company *v.* Richmond, 96 U. S. 521, 529).

In this case of Walston *v.* Nevin, the assessment for the original construction of the street was apportioned upon land abutting on the street according to the number of square feet (except some slight modifications as to corner lots not material to the case). No inquiry was made as to benefits. On the contrary, the rule of apportionment laid down in the statute, namely, apportionment by the square foot, of necessity excluded any inquiry in regard to benefits, precisely as the rule laid down by the statute and ordinance in Norwood *v.* Baker of apportionment by the front *door* of necessity excluded any consideration of benefits. The court distinctly held that the case was governed by the principle laid down by the court in Davidson *v.* New Orleans, and that assessment was not rendered invalid by the fourteenth amendment.

In Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112 (on writ of error to the United States court for the southern district of California) involving the validity of the irrigation statutes in
232 California, an ad valorem assessment upon all land within the irrigation district was held to be not contrary to the fourteenth amendment, although it was objected, (p. 156):

"That the basis of assessment for the cost of construction is not in accordance with and in proportion to the benefits conferred by the improvement. And, finally, that land which cannot, in fact, be benefited may yet under the act be placed in one of the irrigation districts and assessed upon its value to pay the cost of construction of works which benefit others at his expense."

In the argument of this case, it was shown and argued to the court that in the organization of these irrigation districts, towns and villages were frequently included. In one instance the owner of a brick building, which was included in a district, objected that his brick building not only would not be benefited by irrigation, but on the contrary would be much injured by it. The Supreme Court, however, held that these irrigation statutes and the ad valorem assessments levied under them did not violate the fourteenth amendment. The court said (p. 170):

"As was said by Mr. Justice Miller in Davidson *v.* New Orleans, *supra*, where the objection was made that part of the property was not in fact benefited, this is a matter of detail with which this court

cannot interfere if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds. To the same effect Spencer *v.* Merchant, 125 U. S. 345; Lent *v.* Tillson, 140 U. S. 316, 333. In regard to the matters thus far discussed we see no valid objection to the act in question."

233 The court further said (p. 175):

"The fourth objection and also the objection above alluded to as the final one may be discussed together, as they practically cover the same principle. It is insisted that the basis of the assessment upon the land benefited for the cost of the construction of the works is not in accordance with and in proportion to the benefits conferred by the improvement, and, therefore, there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law. Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation."

The court, also, after citing Davidson *v.* New Orleans, and Walston *v.* Nevin, as showing that such assessment did not violate the fourteenth amendment, says (p. 178):

"There are some States where assessments under such circumstances as here exist, and made upon an ad valorem basis, have been held invalid as an infringement of some provision of the State constitution, or in violation of the act under which they were levied. Counsel have cited several such in the briefs herein filed. We do not discover and our attention has not been called to any case in this court where such an assessment has been held to violate any provision of the Federal Constitution. If it does not, this court can grant no relief."

Having considered the scope and meaning of the words "due process of law" in section 1 of the fourteenth amendment, as

234 those words appear and have been used, and having considered certain cases decided by the Supreme Court in regard to assessments down to the case of Norwood *v.* Baker, we are now prepared to resume the consideration of the questions presented and decided in that case.

The court, in Norwood *v.* Baker, lays down the following proposition (p. 279):

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation."

The language of the court here employed as to compensation is not applicable to an argument on the subject of taxation, but would be applicable in the case of taking property by eminent domain. The distinction between taxation and eminent domain is clear and obvious. Taxation is a requirement by the Government of a payment or contribution for public purposes, while a taking of prop-

erty by eminent domain is the Government taking to itself the *res* or *corpus* of the property. In the one case something is paid as a contribution for public purposes. The other case of eminent domain is really the case of a compulsory sale to the Government. In the case of taxation, the contribution is levied and must be paid for the reason that the Government which levies it is sovereign, and the contribution is needed for public purposes, and no *quid pro quo* is required. The person who pays the tax pays it because he is the subject and because the State is the sovereign, and as a
235 matter of constitutional law it does not lie in his mouth to say whether or not he received any *quid pro quo* or an equivalent benefit for the tax.

"The taking of property by taxation requires no other compensation than the tax-payer receives in being protected by the Government to the support of which he contributes." Per Mr. Justice Gray, in Cole *v.* La Grange, 113 U. S., 1, 8.

Judge Cooley, in considering some questions advanced against special assessments on constitutional principles, mentions, among other objections, the following: "That they take property, *i. e.*, money, and appropriate it to the public use without compensation." In answer to this objection, he says:

"This objection would seem to fall with the last (*i. e.*, that they take property without due process of law). If special assessments are taxes the compensation is conclusively presumed to be received by those who pay them. It is only on the assumption that they are laid in the exercise of the power of eminent domain that the objection could have any force whatever. But the distinction between the two cases is very clear." Cooley on Taxation, 2d ed., p. 264.

The court, in Norwood *v.* Baker, says (p. 270):

"The exaction from the owner *from* private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation."

(It is not obvious what distinction, if any, is intended to
236 be made by the court between taxes for public "improvement" and taxes for other purposes, nor is it by any means clear that any distinction exists between them. The particular public improvement which the court had under consideration was the construction of a public street, but a little reflection will show that almost all, if not all, taxes which are levied are for public improvements. The purposes for which they are levied most certainly must be public ones, and if the word "improvement" is to be applied to these purposes, it ought to be applied as much to one purpose as to another. For example, there is no reason why schoolhouses and other public buildings, municipal water works, sewers, lighting plants, almshouses, public museums and public parks, are not as much public "improvements" as a public street, and so also all the expenses for employés and for other purposes connected with all these public improvements.)

If this proposition of the court be true as to a tax for a public im-

provement, it would also be true as to a tax for any other object, so long as that object be public, the test of whether or not the purpose is one for which a tax can be levied being not whether the purpose is what may be called a public improvement, but whether the purpose is a public one. The fourteenth amendment, if it applies to the levy and apportionment of taxes at all, certainly makes no distinction between taxes for public improvements and taxes for any other public purposes.

The case of Norwood *v.* Baker involved an assessment upon land, but if the proposition and principles stated by the court be sound it is difficult to see why they must not apply equally to taxes
237 upon personal property. The fourteenth amendment uses the word "property" and makes no distinction between the different kinds of property, whether it be real estate or personal property. If the fourteenth amendment prohibits the levy of State taxes upon land except according to benefits, it must equally prohibit the levy of State taxes upon personal property except according to benefits.

In Norwood *v.* Baker, the court mentioned several times in its opinion the fact that the entire cost of the land taken and the cost of the condemnation proceedings, as well as the cost of constructing the street, was assessed upon the land of Baker by the front foot; in other words, that land abutting upon the street constructed was required to pay for land and all the expense of constructing the street.

The fact is given such prominence in the opinion of the court that one might reasonably infer that it was regarded either as peculiar to this case of Baker, or as furnishing one of the reasons for the decision of the court. It is also said by the court that the cost of the land for the street, which land was taken from the land owned by Baker, was "assessed back" as a part of the cost of constructing the street.

Parsons *v.* District of Columbia, 170 U. S. 45, is distinguished by the court in Norwood *v.* Baker on the ground that in the Parsons case the water system was for the District. But it at least deserves consideration whether there is any real distinction between the cases. The water system already existed in the District of Columbia, and many miles of water mains had already been laid therein.
238 The assessment levied upon Parsons was an assessment for an addition to an existing system, and this addition was made (p. 49) under an act of Congress of August 11, 1894, which prescribed that "hereafter assessments levied for laying water mains in the District of Columbia shall be at the rate of $1.25 per linear front foot against all lots or land abutting upon the street, road or alley in which a water main shall be laid."

The act of June 23, 1873 (p. 48), had provided that in order to defray the expense of laying the water main and the erection of fire-plugs there should be levied a special tax of 1¼ per square foot on every lot or part of lot which bounded on or touched on any avenue, street or alley in which a main water pipe might thereafter be laid and fire-plugs erected; but the new assessment held valid in Par-

sons *v.* District of Columbia was by the front foot. There is, therefore, no real distinction in respect to the legislation and the facts before the court between the two cases of Norwood *v.* Baker and Parsons *v.* District of Columbia.

— Norwood *v.* Baker, that it will hardly do to say that this question so far as the fourteenth amendment is concerned, is to be governed by whether this tax is levied on a part only of the land in a political subdivision, for in that event it would still be necessary to choose the political subdivision with reference to which the matter is to be determined. If the county be taken as such subdivision one result would be obtained, namely, that this would be an assessment; but if the township be taken the other result would be obtained, namely, that this would be a tax. Which one must be taken under
239 the fourteenth amendment? As all these matters of the creation and dissolution of counties and townships are matters for the regulation of the State, and are not matters with which the Constitution of the United States is at all concerned, it is obvious that no distinction should be made under the Constitution of the United States based on the taking of one political subdivision of the State rather than another in determining whether a public imposition is a tax or an assessment. Any such decision made on such basis could obviously be circumvented by action of the State, either in its constitution or in its statutes or in both combined.

It is not intended to maintain that there is not or may not be a difference between a tax and an assessment as respects provisions in some of the State constitutions or State statutes. This argument does not deal with such questions. Thus, for example, the constitution of the State of California provides (article XIII, section 1) that all property shall be taxed in proportion to its value; and the supreme court of California holds that the word "tax" thus used does not include an assessment; and also holds that assessments equally with ad valorem property taxes are all levied under the taxing power. (Emery *v.* San Francisco Gas Company, 28 Cal. 345, 353.)

It is also held by the court of appeals of New York that both taxes and assessments derive their authority from the taxing power. (People *v.* Brooklyn, 4 New York, 419, 432. So, also, to the same effect is Dillon on Municipal Corporations, 4th ed., section 752.)

It is held in King *v.* Portland, 2 Or. 154: "We certainly
240 agree with counsel that the act of the city council was an attempt to exercise the sovereign right of taxation." With these distinctions, however, the fourteenth amendment of the Constitution of the United States has no concern. If that amendment has anything to do with the apportionment of State taxes it is only with the generic power of taxation, and not with any one species of taxation to the exclusion of other species. Moreover, the rule or proposition stated by the court in Norwood *v.* Baker, would, as is elsewhere stated in this argument, render invalid under the fourteenth amendment the ad valorem property taxes levied in the States and ordinarily called "taxes" equally with what are called "assessments," for ad valorem taxes are not levied according to benefit.

Observe, also, that in the view presented in this brief it is sought to urge that taxes or assessments ought not to be levied according to benefit. That is a question for the consideration of the legislative body, but it is only one of the questions which a legislative body should take into consideration when it provides for the levy and apportionment of a tax. Obviously, there are many other considerations; one of these, for example, is the ability to pay. Exemptions of property below a certain amount are based upon the principle that persons with very small amounts of property ought not be made to pay any tax. This principle, for example, was considered in framing the Illinois inheritance-tax act, which exempted estates of decedents amounting to $2,000 or less. The Supreme Court held that this exemption did not violate the fourteenth amendment to the Constitution of the United States (Magoun *v.*
241 Illinois Trust & Savings Bank, 170 U. S. 283); nor is there generally to be found in the constitutions of the several States any provision restricting the legislative body to the consideration of only one of these questions that ought to affect taxation, namely, as to the benefit received by the person or property taxed.

Whether it would be wise for the State constitution to make any such restriction is a question as to which the argument is certainly not all on the side of the persons who had maintained that such restriction ought to be made. One of the many reasons why such restriction ought not to be made is that there would be difficulty in enforcing them. A rule of *quid pro quo* enforcible by the courts as to all taxes would greatly obstruct their collection. It would upset most of our taxes. The general ad valorem property tax in the State, city, county, or any other subdivision of the State, could no longer be levied, but it would be necessary to have an inquiry and hearing in each instance as to benefit received by the person or property taxed. This would probably result in the government being hindered in its proper functions for want of revenue, owing to delays and contests in the courts.

Nor is there any good reason why the constitutions of the several States or of the United States should thus restrict the legislative body in respect to that mode of taxation which is sometimes termed an assessment. As we have seen above, no such restriction could be made effective without defining what is meant by the term "assessment." Various kinds of taxes have been called assessments,
242 both in the State courts and in the United States court. Thus, for example, in the case of Davidson *v.* New Orleans, a drainage tax, levied according to area in a single taxing district, was called an assessment. So also, a drainage tax in Hagar *v.* Reclamation District, levied according to benefits, was called an assessment. In Walston *v.* Nevin the assessment was levied by square feet upon property abutting upon the streets improved. In Fallbrook Irrigation District *v.* Bradley, an assessment for irrigation purposes was levied ad valorem upon all the real estate in the irrigation district, including, among other things, houses and other buildings in towns. (In Kelly *v.* Pittsburg, 104 U. S. 78), an ad valorem property tax for all city purposes was levied upon agricultural lands in the outskirts of

a city, most of which purposes it was claimed could not be enjoyed by the land. In County of Mobile *v.* Kimball, an ad valorem property tax for improving the harbor of Mobile was levied upon one county instead of being levied upon the city or upon the whole State. All these taxes, except the tax in the case of The County of Mobile *v.* Kimball, and Kelly *v.* Pittsburg, were called assessments by the Supreme Court of the United States, while in those two cases they were called taxes. It is not obvious where the constitutions of the several States where these cases arose or the Constitution of the United States ought to require that these "assessments" be levied only according to benefits, or not in excess of benefits, and at the same time permit these "taxes" in the two cases of County of Mobile *v.* Kimball, and Kelly *v.* Pittsburg, to be levied ad valorem and irrespective of benefits. If, therefore, a State constitution, or
243 the United States Constitution, attempts to provide that any particular kind of taxes such as assessment shall be levied only according to benefits, or not in excess of benefits, it is necessary to make some definition of assessment, and some line of demarcation between assessments and other taxes.

Does the fourteenth amendment to the Constitution of the United States cut off the State legislative body from levying and apportioning taxes in any other mode than according to benefits, and does it provide that taxes shall not be levied in excess of benefits? It certainly does not make any such restriction as to State taxes generally. Historically and on principle and on decided cases the fourteenth amendment has nothing to do with the levy and apportionment of taxes, for we are bound to take this case and consider it in connection with a long line of unbroken decisions wherein the Supreme Court of the United States has decided the identical question involved in the case at bar.

The cases decided by the supreme courts of the several States of the Union down to the case of Norwood *v.* Baker clearly hold that the question of creating a taxing district for the purpose of street improvements in the absence of constitutional restrictions is vested solely in the legislature. I do not mean to say that cases have not arisen where courts of equity, on account of the peculiar position of the property, or where, on account of incorrect methods of assessment, have not held State statutes void, but I do mean to say that I have found no case, nor do I think there are any cases, holding that
it is not within the power of the legislature to create a taxing
244 district and to declare the nature of the assessment, whether upon adjacent property, frontage, or superficial area. There are numerous cases similar to the case of Sears *v.* Boston, *supra*, Norwood *v.* Baker, *supra*, and Railway *v.* Portland, *supra*, where an illegal method has been adopted by the State or by the council in making the assessment; and it is also true that the courts of different States have expressed various ideas of the propriety of certain classes of assessments, but it will be found upon examination of these cases that peculiar circumstances existed, particular conditions arose that were only applicable to the case under consideration, and the courts were not laying down general principles of law; but there

is nothing in this case to affect the constitutional right of the city of Portland to levy this assessment. There is nothing in the law to hinder the complainant from setting up as a defense that the assessment is void for want of authority to levy it or that it was partially or unfairly or unequally assessed.

When the first notice is given to the property-owner notifying him that plans and specifications are on file and that the city proposes to build an elevated roadway upon this street and assess the cost thereof against the adjacent property as provided by the charter and ordinances, it then becomes the duty of the property-owner to take notice of what was proposed to be done. They knew the character of the improvement and had the same means and the same facilities for figuring out the probable cost as members of the common council had. Where the courts have held the assessments void, either because the law permitted matters that were not
245 the subject of special benefit or permitted an assessment that was so substantially in excess of the benefits, the courts could see that it was a fraud upon the property-owner, as in the case of The Oregon, California Railroad *v.* Portland.

Notwithstanding the fact that the State courts have frequently held that assessments so substantially in excess of benefits to be fraudulent should be set aside, the Supreme Court of the United States has clearly held that such an excess was not a Federal question. Therefore it may be taken as settled that up to the time of the decision of Norwood *v.* Baker all the courts, with possibly the exception of Tennessee, had agreed that assessment under a statute like ours was a legal and constitutional assessment, and that the notice was a legal notice with due process of law. The case of Norwood *v.* Baker does not in any manner disturb the line of decisions up to this time upon the question of notice, and we think we have shown that the case of Norwood *v.* Baker did not intend to overrule the decisions of the Supreme Court from its earliest history, nor to overturn its repeated decisions under the fourteenth amendment of the Constitution of the United States, and that the rule of law in reference to street assessments was not disturbed excepting so far as that rule applied in cases where they undertook to condemn property for the Government and assessed the cost of the condemnation under the guise of benefits. Judge Jackson first passed upon this question in Ohio in a street-opening case in 36th Federal Reporter, Judge Sage, who rendered the decision in the Norwood case (74th Federal, 997), distinctly put his decision upon
246 the same ground that Judge Jackson did in the 36th. These decisions were both based upon the ground that where the State undertook to take a man's property away from him and the constitution prohibited offsetting benefits against damages, they could not under the guise of street assessments require the property-owner to stand the entire loss of his property, and this was the question that was before the Supreme Court of the United States. Justices Brewer, Gray and Shiras dissented, and Justice Brewer stated four propositions. First: That the taking of land under the constitution itself may be charged against the property benefited,

This proposition is not denied by Justice Harlan, but Justice Harlan undertook to say what property was benefited under the law in the constitution of the State. Second: Justice Brewer said that the right to take land is equally true under the Constitution of the United States. This proposition is not disputed by Justice Harlan. The third proposition, in reference to the cost of the improvement, is not material in the question under controversy. The fourth proposition, that a public improvement having been made it is a legislative function to determine the area benefited, and the legislative determination is conclusive, citing Spencer *v.* Merchant. Justice Harlan, in speaking of this case, says, p. 295: "We do not think that the present case is necessarily controlled by the decision in Spencer *v.* Merchant," 125 United States, 345, 351 and 357. That case came here upon a writ of error of the highest court of New York. It related to an assessment by legislative enactment
247 upon certain isolated parts of the land of a named aggregate amount which remained unpaid for the cost of the street improvement which had been ordered by the legislature to be levied, and which clearly shows that the decision in Spencer *v.* Merchant, so far as it was distinguished from Norwood *v.* Baker, was put upon the ground that the legislature had created the district authorizing the levy, gave the parties notice and opportunity to be heard, and under these circumstances such an assessment could not be disturbed under the fourteenth amendment of the Constitution of the United States. And the same is true of Parsons *v.* District of Columbia. The court said that the power conferred upon Commissioners was not to make assessments upon abutting property nor to give notice to the property-owner of such assessment, but to determine the question of the propriety and the necessity of laying water mains (pp. 294, 295). The dissenting judge maintained that the logical result of Justice Harlan's statement would be to overthrow a long line of State and Federal decisions, and Justice Harlan said that the decision in Norwood *v.* Baker is not in conflict with these decisions, and the objection itself and the judgment of the Supreme Court, in affirming the decision of the circuit court, states that it is distinctly upon the ground that it was taking a private property for public use without compensation.

The next question to be considered, is what construction the various courts have placed upon the decision of the case of Norwood *v.* Baker. In Fay *v.* Springfield, 94 Federal Reporter, 409, the court held the street assessment for the cost of improving the street
248 or levied on a front-foot rule as unconstitutional and void, and based the decision upon the case of Norwood *v.* Baker, notwithstanding the fact that the supreme court of the State of Missouri had frequently decided that the statutes gave due notice and opportunity for the property-owner to be heard, and that the same was not contrary to any provisions of the State constitution. The case of Cowley *v.* City of Spokane, 99 Federal 840, was based wholly upon the decision in Norwood *v.* Baker without any particular discussion of the case as applied to the late decisions in the State of Washington, or the decision of the Supreme Court of the United

States in the case of Bellingham Bay Co. *v.* New Whatcom, 172 U. S. 314.

The case of Charles *v.* City of Marion, 98 Federal 166, is really not a decision holding abutting assessment void, but the court grants an injunction until such time as the supreme court of the State shall pass upon the Barrett law and give it such a construction as will bring it within the provisions as to notice which the court thought was decided in Norwood *v.* Baker. Thus it will be seen that no case, State or Federal, has held that the rule contended for by appellants, as laid down in Norwood *v.* Baker, applied in cases where the assessment is made under statutes like ours, where the district has been created by the legislature and provisions made for charging the cost of an assessment against the property in the district.

It is interesting to read the decision of Fay *v.* Springfield *supra*, and to notice upon what the court bases its decision, that a
249 front-foot assessment is void. This directly opposes Parsons *v.* District of Columbia, Spencer *v.* Merchant, Davison *v.* New Orleans, and Hayger *v.* Reclamation District. It would be equally as interesting to take several cases which have been decided by the Supreme Court of the United States. For instance, the case of Ross *v.* Railway, where the Supreme Court held that a conductor and an engineer on the same train were not fellow-servants and that the conductor was a vice-principal as to the engineer. The district and circuit courts throughout the country were immediate filled with decisions based upon Ross *v.* Railway deciding who were vice-principals. The prominent lawyers throughout the United States vigorously contended, as they are now contending in reference to the case of Norwood *v.* Baker, that the Ross case was only applicable to the particular facts disclosed in that case, which was based upon a rule of the company, that under certain circumstances the engineer and trainmen should take their orders from the conductor, which of course made him under that particular rule of the company a direct representative of the company, for the purpose of that rule, and yet it took several years before the State courts and United States courts settled down just where they were before the Ross case, in reference to what constituted a vice-principal. But the question of street improvements is a question of great importance in this United States, with its thousands of cities and millions of dollars expended every year in street improvements, and from the earliest history of our Government has been solely in charge of the States and only sub-
250 ject to the constitutional limitation placed upon the State as to special assessments for street improvements. The State courts have examined the question with a great deal of care, and we find that every State court, with the exception of Texas, that have had occasion to pass upon the case of Norwood *v.* Baker, hold that it does not announce any new doctrine, and hold that where the law had been held constitutional in the State before the case of Norwood *v.* Baker, so far as street assessments are concerned, that street improvements are valid. The supreme court of Massachusetts, in Shaw *v.* Boston, *supra*, say that the rule laid down in Norwood *v.* Baker is not a new rule. Some courts have sustained the

law or sustained laws similar to ours in *phinciple* where a question was raised without discussing the case of Norwood *v.* Baker. Therefore we must take it that they do not consider the case of Norwood *v.* Baker applicable. Take the case of Webster *v.* The City of Fargo, (N. D. May 5th 1900), 82 Northwestern Reporter, p. 732. This case takes up and considers all the supreme court cases touching the question of street assessment, stating "after a careful study of the opinion in Norwood *v.* Baker, we are not convinced that the court intended to enunciate the broad proposition for which appellant contends. We think that case depended entirely upon the particular statutes of the State of Ohio there considered, and if statutes, as construed by that court, authorized a special assessment of the front-foot plan without any legislative determination expressed or implied if such property had been specially benefited to the extent of the special assessment or at all." In Lincoln *v.* Dore, 57
251 Northeastern, 356 (May 13, 1900), the court said that they would be slow to believe that anything in Norwood *v.* Baker or any other authoritative decision threw doubt on the validity of such assessments on the grounds supposed. In Sears *v.* Boston, in 1st Mun. Rep. 497, sustained in abutting assessment upon adjacent property for watering the street, they cite Baker *v.* Norwood and say that it is a grave question whether there is any benefit in watering the street in front of vacant lots, although the cases generally which uphold such decisions relate to improvements of a permanent character, and the court said that the case of The Village of Norwood *v.* Baker, contains an elaborate discussion of the subject and holds that a local assessment for an amount in substantial excess of the benefits received is in violation of the fourteenth amendment of the Constitution of the United States. This principle, as has often been stated by this court, leads to the same result. (Page 501.) Thus it will be seen that the court did not consider that The Village of Norwood *v.* Baker enunciated any new or strange doctrine and that in announcing the rule that the taking of a man's property substantially in excess of compensation was a violation of the fourteenth amendment of the Constitution of the United States. In Sears *v.* Boston, 2d Municipal Reports, 184, they again cite The Village of Norwood *v.* Baker (page 187), and say that taking of property to pay a charge which is not founded on special benefit or equivalent received by the estate or its owner would be taking property without due process of law. In Adams *v.* The City of Shelbyville, Ind., April 27, 1900, 3d Mun. Rep.,
252 p. 575. At page 581 the court refers to the case of Norwood *v.* Baker, and say: "The particular question presented for consideration involves the validity of an ordinance (Norwood) assessing upon appellant's land abutting upon each side of the new street an amount covering not only an amount equal to the cost of the land taken for the street, but in addition the costs and expenses connected with the condemnation proceedings. After citing many authorities, the court said, page 586: "We conclude, therefore, that the principle applied to assessments for local improvements are these: The legislature may create or authorize a municipality to create a local taxing district for local improvement purposes which includes that

part only of the property within the municipality. The legislature may declare constitutionally that only the property within the taxing district shall be specially assessed on account of the local improvement within that district. The Barrett law of Indiana was particularly assailed in the decision in the Norwood *v.* Baker case. The court held that the common council, being a representative body authorized to determine the necessity of an improvement and the assessment of a cost only after a notice to the property-owners that they proposed to proceed with a public improvement, was due process of law and not in conflict with the Norwood case. One of the judges dissented and attempted to show that the case was in conflict with the Norwood case. It will be noticed that so far as the notice is concerned and the opportunity to be heard upon the question as to whether the property should be assessed or not, and
253 the question of the utility of improvement is very similar to our law, and furthermore the contention that the council is making in this case is practically the same as the objections raised to the "Barrett law," where the supreme court of that State sustained the assessment. This case practically disposes of the case of Charles *v.* The City of Marion, 98 Federal, 166, cited by appellants, where the court granted an injunction against an assessment until such time as the supreme court has construed the "Barrett law" in reference to notice and opportunity to be heard upon the right to assess the whole cost of improvement against abutting property. In State *v.* The District Court, 83 Northwestern, p. 183, a front-foot assessment was attacked as being laid without regard to benefits, and the court stated that the evidence was that the board had determined that this property was especially benefited, at least to the cost of the entire improvement. (The common council in the case at bar testified to the same facts.) The court stated that the judgment and determination of the board is as we have seen final and conclusive, unless it is shown to be fraudulent in fact, or in making the assessment the board applied an illegal principle or an erroneous rule of law, although the case of Norwood *v.* Baker is not cited in the opinion, but was cited by the counsel and undoubtedly considered by the court in reaching this decision. *In* Gleason *v.* Waukesha County, 3d Mun. Rep. 385, decided May 23, 1899, was an action to avoid a special tax levy raised under a statute which provided for laying mains before the street is improved. The statute provided that when the council should order
254 a pavement, they shall by resolution require the gas and water mains to be connected, which shall be published for six days. If the property-owners do not make the connection, the city shall do it and assess it against the property. The reasons assigned for avoiding the taxes were that the charter provisions violated the constitution against taking private property for public use, and no sufficient notice was given to acquire jurisdiction to proceed with the work. The facts disclosed by the record *was* that the plaintiff objected to this assessment being made as unconstitutional and void and that it was an arbitrary assessment compelling them to connect the water and gas with a private company. The court considered

all these questions, and also the case of Norwood *v.* Baker, and stated, so far as the evidence shows, there was such equivalent in fact; hence in the most recent holdings, the constitutional power to make such assessments, the law itself and the tax imposed under it, must be sustained so far as any objection thereof is made under constitutional ground. Norwood *v.* Baker, 172 U. S. 269. This case particularly cites the Hennessy case, *supra*, where the supreme court of Wisconsin, subsequent to the Norwood case, decided a frontage assessment under a statute similar to ours, and sustained the validity of it.

Thus it will be seen that the supreme courts of all the States that have so far passed upon the Norwood case, excepting Texas, has given it the same construction that I have attempted to give to the case. Hutcheson *v.* Storis, 92 Texas, p. 685. This was a suit to enjoin the collection of a street assessment against property that
255 laid in the outskirts of the town as stated by the court was situated in a part of the city where there were few houses and those of little value; much of the property was used for pasturage. There were no water mains, electric lights or sewerage, in that portion of the city and as to whether the value of the property was equal to the amount of the assessment, the testimony was conflicting, and the issue not determined. The court cited that Norwood *v.* Baker established two propositions, one of which was that the law under which the assessment was made did not afford the property-owner an opportunity to contest the grounds of the assessment made upon her property, and that she was not estopped to deny its validity (p. 693), and on page 694 the court asked these questions: The question arises, Did the charter afford to Mrs. Hutcheson the opportunity to contest the mode of making the levy? It will be noticed in this connection that the only notice that was given to the property-owner is a notice authorizing property-owners after the assessment has been made to call upon the common council to "revise and correct errors" committed in the proceedings (p. 696), and the court then proceeds to define what is meant by "revisions and corrections" and hold that it does not authorize the council to consider benefits in these words, or to make any changes excepting those that have resulted from clerical errors. In the case at bar the common council, before they can make an improvement, are required to give a notice of intentions describing with particularity the character of the improvements, and this notice authorizes any person inter-
256 ested to appear and object to the improvement. The notice further provided that the cost of the improvement should be assessed upon the adjacent property. It therefore became a question for the consideration of these people who owned property as to whether the cost of the improvement would be such that it would not warrant the property-owners in having the same improved; that was their time and opportunity and the proper time and opportunity to come before the common council and make their objections, if any they had, why this improvement should not be made. In the Storis case, a resolution was published that the council proposed to improve the property and assess the cost thereof

against the adjacent property, but there was no provision for any hearing at any time on the question of necessity of the improvements or upon the question of the propriety of the improvement, as there is in our statute, and the only time that Mrs. Hutcheson had an opportunity to be heard as to whether the improvement should be made or not was after the contract was let, and the assessment made, and the statute in the Storis case further provided that the owner, if he was dissatisfied, should bring an injunction suit, and in the injunction suit they were limited to the facts alleged in the protest, and the only facts that were considered in the protest *was* "revision and correction." Thus it will be seen at no time or any stage of the proceedings in the Texas case would any property-owner have the right to protest against an improvement or to be heard before the common council upon the question of whether the cost of the improvement would exceed the benefits, as
257 is provided in our case. While upon its face the Storis case appears to be against our position, yet when the law upon which the decision arose is examined and the peculiar facts surrounding this particular case, the court will find the case holding in line with the other decisions.

In this argument I have considered the question of street assessments, both before and subsequent to the decision in the Norwood case, and, as I once stated in this argument before, the court in which the Norwood case was involved, has, in my opinion, brought out nothing new in that decision, and that the same principles shown in the Norwood case had frequently been laid down by our own supreme court, and, with the exception of the *obiter dicta* in the Norwood case, has always been considered as good law in this court.

The appellants are contending that they were entitled to the notice and hearing upon the determination of the assessment. In some of the charters in this State, the statute provides that the cost of an improvement shall be levied upon such property as the council deems to be benefited. Under all such statutes it is necessary for the council to declare the district that is benefited and to give a notice and an opportunity to be heard upon the question of distribution of benefits between property-owners because in all such cases the legislature has delegated to the property-owner and to the common council the authority to adjust the distribution of the tax levy, and it would not be due process of law for one of the parties to undertake to make an adjustment itself; but where the legislature selects the taxing district and
258 says that an assessment should be made upon this district for a street improvement, then it has left no discretion to the common council upon the question of the distribution of the assessment. In all such cases, the party is not entitled to a notice and hearing because there is no distribution to be made. Gillett *v.* City, 21 Fed. Rep. 822. Palmyra *v.* Morton, 25 Mo. 593. Works *v.* Lockwood, 28 Hun. 9. Fennell *v.* Kates, 19 Ohio St. 404. Cleveland *v.* Trip, 13 Rhode Island, 50. State *v.* Commissioners, 29 Atlantic, 429. Barkley *v.* Oregon City, 24 Or. 515–521. Parsons *v.* District of Co-

lumbia, *supra*. Spencer *v.* Merchant, *supra*. Fallbrook *v.* Bradley, *supra*. The appellant admits in his brief that the legislature can determine that the property assessed is benefited, and the extent thereof, but these holdings limit the rule to cases where the method adopted may and ordinarily will result in approximate equality and where the benefits of the property can be seen to probably and reasonably flow from the improvement (pp. 18–19). Therefore, if the legislature has the right to fix the district and determine what property shall be assessed and what shall be the benefits to this property within the rules that I have heretofore laid down, there can be nothing left for the council to do further, after the street has been accepted, but to make a calculation and allow the assessment, as provided by law. This question clearly does not involve any question of due process of law or of depriving a person of the right to be heard upon any question affecting the validity of the assessment. Should they try, as I have heretofore undertaken to
259 show in this brief, it would be necessary to have such a hearing in all cases where an ad valorem tax is made.

NOTICE SUFFICIENT TO CONSTITUTE DUE PROCESS OF LAW WAS GIVEN.

It is undoubtedly true that notice in some form, at some stage of the proceedings, of the intention of the common council to improve the street must be given.

The charter of 1898, section 128, provides: "That no grade or improvement mentioned in section 127 can be undertaken or made without ten days' notice thereof first being given in some daily newspaper published in the city of Portland."

The council caused a notice to be duly published for ten days that they proposed to improve it at the cost of the adjacent property-owner and levy assessments to pay the same, as provided by the charter.

This notice notified the property-owners that they proposed to assess the cost thereof, as provided in sections 137 and 138 of the charter, and it was the duty of the property-owners to take notice of the provisions of sections 137 and 138 of the charter. And this notice likewise described the character of the improvement, and that the plans and specifications were on file in the auditor's office.

It is evident that the plaintiffs had knowledge of what was intended to be done, because on December 12 the plaintiffs filed in the office of the auditor of said city a remonstrance against said improvement, which remonstrance, after being duly read before said common council, and a hearing had before its committee on
260 streets of the matter of the objections thereon, *and it* was ordered placed on file and not granted.

(Abstract, p. 9.)

Therefore, sufficient notice had been issued to give the council jurisdiction to proceed with the improvement.

And the court has held that as a matter of fact the council acquired jurisdiction to make the improvement, therefore, jurisdiction having been thereby acquired, the council was authorized to proceed by

enacting a time and manner ordinance, providing for the improvement. When the improvement was completed the common council caused notice to be published of the completion of the same, and that for any person interested to file objections to the acceptance thereof.

And thereby the plaintiffs again had notice that this assessment was to be made. Thereupon the common council passed an ordinance declaring the probable cost of this improvement and assessed the same on the adjacent property, as provided in section 128 of the charter. Thereupon notice was again published, notifying the owners that if the assessment was not paid the same would become delinquent; and still no steps were taken by these plaintiffs to ascertain any of their rights that *are* are now seeking in the courts. And the question is, were these notices sufficient to attract the attention of the property-owners to the fact that their property would be assessed for the cost of this improvement? They knew what the cost was when they appeared, and had an opportunity to adjust the question of the cost when the notice was published calling
261 upon them, if they had any objections to the acceptance of the street to file the same.

Bellingham Bay Co. *v.* New Whatcom, 172 U. S. 318.

The statute itself fixes the assessment, and they are bound to take notice of the law, and, furthermore, section 132 of the charter provides that notice must be published that the council propose to let a contract for the improvement to the lowest responsible bidder. This was done in the case at bar. Here was another case where the property-owners had notice of what the council was doing. Therefore, upon this branch of the case the only question to be considered —: Is this sufficient notice to constitute due process of law?

The amount of the assessment was a mere matter of calculation, as shown by the estimates on file in the auditor's office. And there was nothing for the council to do but to follow the directions of the statute and assess, under the charter, for one-half of the street in front of which the improvement was made, the cost thereof.

And it appears affirmatively from the records that the council has made the assessment in substantial compliance with the authority given by the charter.

In Paulsen *v.* City, *supra*, the same question was raised as of the sufficiency of notice to give the council jurisdiction to lay down a sewer, and the supreme court of the State held that the notice of intention was sufficient to give them jurisdiction.

The doctrine maintained and enforced by the Supreme
262 Court of the United States is in substance that the constitutional requirement of due process of law, as applied to assessment and taxation, is not infringed by a State law authorizing an imposition of a local tax upon specific property which is benefited by the improvement, to pay the cost thereof.

In Hager *v.* Reclamation District, 111 U. S. 701, at 708–710, Justice Field, speaking for the court, says: "But where the taking of property is the enforcement of a tax, the proceeding is necessarily

less formal, and when a notice to him is at all necessary, it may depend upon the character of the tax and the manner in which its amount is determinable * * * of the different kinds of taxes which the State may impose there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be any possible advantage to him, such as poll tax, license tax and, generally, specific taxes on things, or persons, or occupations. In such case the legislature, in authorizing the tax, fixed its amount and that is the end of the matter. If taxes be not paid the property of the delinquent may be sold and he be thus deprived of his property, yet there can be no question that the proceeding is due process of law, as there is no inquiry into the quality of the evidence or other elements of a judicial nature, and nothing could be changed by hearing the tax-payer, no right of his is therefore invaded."

As in the case at bar, a hearing was given the property-owner on the question of accepting the street and paying the contractor the price thereof, and when this hearing was had, and the question was determined by the council, it became definitely fixed,
263 because the statute itself then directed the council exactly what it should do, and no right of the parties could vary or change this. And if any rights of the parties had been abused or invaded, or they had acted wrongfully or oppressively, it was the duty of these plaintiffs at that time to have reviewed the proceedings of this body.

Here was a notice and hearing as to the apportionment of the tax. Because when the street was accepted under the contract the amount became definitely fixed and certain, and the balance became a mere matter of calculation.

As said in Kentucky R. R. Co. *v.* * * * , 115 U. S. 331:

"It has, however, been repeatedly decided by this court that proceedings to raise public revenue by levying and collecting taxes are not necessarily judicial. And that due process of law, as applied to that subject, does not imply or require a right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgment of judicial tribunals * * * Notice by statute is generally the only notice given, and that has been held sufficient."

As was said in Railroad Tax Cases, 92 U. S. 575: "This board has its time of sitting fixed by law." * * *

"Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked."

These remarks are particularly pertinent to the proceedings of the common council in the case at bar, in making the assess-
264 ment in question. The plaintiffs were notified in the first instance that the assessment would be made upon the adjacent property; second, they were notified that bids would be received for making the improvement; third, they were notified that the common council at a certain time would receive bids for making

the improvement; fourth, they were notified that within a certain time they were to file their objections against the acceptance of the improvement from the contractor. They were likewise notified of the assessments of the common council. They were public. No claim is made that they were not. No claim is made of want of access or ability to reach the common council. They were owners and interested in the property. They had already appeared and knew at each stage of the proceedings what was going on. But it occurs to me that it does not make any difference whether they appeared or not, so long as they had notice of the fact and an opportunity to appear.

In Paulsen *v.* Portland, 149 U. S. 30–39, where the question was one of notice to tax-payers, the court says: "While not questioning that notice to tax-payers in some form must be given before assessments for construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property, we do not think it essential to the validity of any section of the charter of the city granting power to construct the sewer that there should any terms be expressed either the necessity for or the time and manner of notice."

And in Lent *v.* Tillson, 140 U. S. 316, at p. 328, the court says: "Notice by publication is sufficient notice of any proceedings of this nature."

265 It is beyond question that the council had lawful authority to make this improvement and that they adopted plans and specifications therefor, and that notice was given to all parties interested that they proposed to make the improvement at the cost of the adjacent property. That they advertised for and received bids for doing the work so ordered, after having put on file in the office of the auditor, plans and specifications for the same, and when the work was completed, notified these people to file their objections against the acceptance of the same. Thus, at every stage of the proceedings, giving the plaintiffs an opportunity to contest the charge thus imposed in the ordinary courts of justice. With notice in regard to the property that they proposed making the assessment upon, it seems to us, cannot be said as depriving an owner of his property without due process of law.

As was said in Spencer *v.* Merchant, 125 U. S. 345: "The legislature in the exercise of its power of taxation has a right to assess the whole or a part of the expense of a public improvement, such as a laying out, grading or repairing of a street, to be assessed upon the owners of the land benefited thereby, and the determination of the territorial district which should be taxed for the local improvement is within the province of legislative discretion. If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question of WHAT PROPORTION OF THE TAXES SHOULD BE ASSESSED UPON HIS LAND THERE IS NO TAKING OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW."

266 And it seems to us that the official acts and proceedings authorized by the charter, as done in the case at bar, when taken together with the public record, provide for due process of

law in the present case within the principles sanctioned by the decisions referred to.

There can be no sale of the property of a citizen until he has had ample time to make application for all appropriate remedies, and we submit that within the rule laid down in

Wilson *v.* Salem, 24 Or. 504.
Barkley *v.* City, 24 Or. 515.
Clinton *v.* City of Portland, 26 Or. 410.

That if the plaintiffs were not satisfied with the result of their hearing before the common council upon the acceptance of this improvement, the acceptance of which would definitely fix the amount of the assessment, it was their business then and there to have reviewed the proceedings. And as all the charter requires, and as they concede in their brief, that constructive notice is all they are entitled to, and as this notice was not only given but actually received by plaintiffs, they cannot at this time be heard to complain or are not entitled to the aid of a court of equity to enjoin this assessment.

And under any circumstances, as we understand the rules of equity, they are not entitled to enjoin this assessment on account of any intermediate orders, for after the street improvement is completed the contractor has a right to be paid for his services, and any matter that they might have avoided prior to the making of the contract would be unequal and unjust to allow them to use
267 it to defeat the assessment arising as a result of the expenditure of time and money subsequent to the alleged omission. If the plaintiffs did not think it was necessary to make so extensive an improvement and had any rights arising thereunder, it was their duty to ascertain them prior to the time when the contractor had expended his money and benefited their property by this improvement.

This method of assessment has been in vogue in this city for over a quarter of a century, and it must have been eminently fair or the people would have changed the law through their representatives in the legislature and the facts are that the present method of assessment of the city of Portland is based upon the most approved engineering principles. The contract is let for each block by itself, the price is so much for fill and so much for cut, and one balances itself against the other. The only difference in cost between two pieces of property lies in the fact as to whether there is any cut or fill, simply consisting in putting the street to a line of gradation. After that is done the balance of the street costs, so far as one lot is concerned, just as much as another, and it is perfectly right and proper that the man whose property is less accessible and more inconvenient to get to should pay for that which makes his property equally as valuable as his neighbor's. While there may be cases arise where individuals would not receive the benefit from an assessment equal to the cost of the improvement, when such a case arises it is the duty of the owner to appear before the common council when it gives the

notice that it proposes to improve a street and assess
268 the costs of the improvement in front of a man's property to his property, to appear and show that the cost is in excess of the benefits, and if the council disagrees with him upon that proposition, it then becomes his duty to apply to the court for relief under the special circumstances arising in the given case. He stands exactly the same as any property-owner would stand in any case where assessments were to be made under any rule if, whenever the time came for the legislature or the municipal body to decide that they would do a certain thing and assess the proportion of the cost against a person's property, to appear and object, where opportunity to appear is given, as it is in this case, and should the body authorized to determine the necessity of the work overrule his objections and he believed that the assessment would be in substantial excess of the benefits, it would be his duty to take such steps as he was advised was sufficient to review or enjoin these proceedings because, from the very necessity of the case, the party should be required, whenever he believes that a party delegated with authority to do an act in behalf of the public that is injurious to him, to not wait until the public expenditures are made and he has derived all the benefit that is possible out of it and then be allowed to enjoin the proceedings, when it is too late to save the public the cost of the improvement.

Under the decision of our court, the party has the right to the writ of review to review the proceedings of a common council or other public body. Fanning *v.* Gilham, 61 Pacific, 636.

269 It is no objection to this assessment or to the validity thereof that it is for an elevated roadway. The testimony in this case shows that this property is situated in the central part of the city, that the improvement is a part of a common plan for improving the land along the river bank, which is subject to overflows, and it only became valuable when improved, as this property was improved, and that in order to utilize the property and the only value that it did have was by constructing roadways similar to these roadways; and that as a matter of fact the property was increased in value to the amount of about $1,000 per lot, which was much more than the amount of the assessment. Counsel says it is admitted that property could not be reached excepting by climbing down or jumping off from the bridge. We will go further than that. So far as the land is concerned, we will admit that it can only be reached at certain seasons of the year by diving in the water, but that does not affect the question of benefits, which rather goes to show that it is the only possible method of making this land useful, and so far as the common council is concerned, and so far as the legislature is concerned, and so far as the courts are concerned, the only question for their consideration is the cost of this improvement substantially in excess of the benefits. If it is, then it was the duty of the appellant to review the decision of the council when they decided that it wasn't. If it is not, then the court is not concerned with the question of whether you have to use a ladder or a diving suit. The same thing is true of property where it lies above the grade

of the street. I know of several places in the city of
270 Portland where it is necessary to climb twenty or thirty feet to reach the surface of the property. Counsel cites The Oregon, California R'y Co. *v.* Portland as sustaining his position. The case is not in point because it went off on the sole question that the property was so situated in connection with the railroad and these streets running out into the river that it could not be used; and was an injury rather than a benefit to the property and that these facts show fraud on the part of the council sufficient to avoid the assessment.

Take the case cited by counsel, 138 Pennsylvania State, 375. This case was the assessment of a right of way and the court there held as a matter of law that a railway right of way could not be benefited by a street improvement. That decision is contrary to later decisions in that court, the Supreme Court of the United States, and several State courts, but the court has found in this case that the property is benefited by the improvement. The case of Boston *v.* Shaw, 42 Mass. 130, is not in point. That case turned upon the question as to how the assessment could be made under the ordinance. The case of Bloomington *v.* Railway, 134 Ill. 458, has since been distinctly overruled by the supreme court of Illinois and the Supreme Court of the United States. That is, the courts have held that they had the right to assess the right of way of a railway. The court did not hold in Railway *v.* Portland, 25 Oregon, 229, that an elevated railway would not be a benefit to adjacent property.

I have discussed the questions involved in street assessments
271 at considerable length. This has been necessary on account of the large number of decisions covering this question, and in conclusion I have simply this to say: That ever since the case of King *v.* Portland, the legislature has given the same constitutional construction to that case as the court gave. Miles of street have been improved, millions of dollars have been spent, and in the city of Portland to-day there are many streets under the course of improvement under this law. Some cases were initiated by the people; in other cases when the property-owners petitioned for the improvement. The form of notice that is now required has always been recognized by the court and bar as legal, and surely this court has not lacked for an able judiciary, or for distinguished constitutional lawyers for almost one-third of a century. Years ago these same constitutional lawyers recognized the difference between street and sewer assessments, having provided that in case of a sewer assessment the district must of necessity be fixed by the common council or by some body of men appointed for that purpose, and the cost of the sewer could be assessed against the property benefited. This rule of assessment was attacked on the ground of its constitutionality, and our supreme court at that time laid down a rule as to what constituted a constitutional assessment and due process of law, or, in other words, sufficient notice. Poulsen *v.* Portland, 16 Oregon, *supra*. That case went to the Supreme Court of the United States for its decision. That body sustained the construction placed upon the Constitution by our courts and, as I have said, we have not

been lacking in constitutional lawyers, and if our methods for
272 making assessments for street improvements, fixing and defining districts, had been unconstitutional, these same distinguished gentlemen would have said so long ago, and it seems to me that that which has been considered a settled law in this State for the last quarter of a century should not be disturbed by the *obiter dictum* in the case of Norwood *v.* Baker.

Respectfully submitted,

J. M. LONG,
City Attorney and Attorney for Respondents:

Mr. Long:

Boyd *v.* Detroit, 82 N. W., 253.
Barrett *v.* Stone Co., 52 S. W., 947; 54 N. J. Eq., 270.

273 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court-room in the city of Salem, on the first Monday, the 1st day of October, 1900, present: Hon. Robert S. Bean, chief justice, Hon. Frank A. Moore, associate justice, Hon. Charles E. Wolverton, associate justice, and J. J. Murphy, clerk, the following proceedings were had on Monday, the 10th day of December, 1900, the same being the 37th judicial day of said term:

A. N. KING, P. J. MANN, A. S. NICHOLS, THE Multnomah Investment Company, a Corporation, and Fred H. Pendleton, Appellants, *vs.* THE CITY OF PORTLAND, THE BOARD OF Public Works, The Common Council of said City, D. H. McLaughlan, Chief of Police; A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works, and M. W. Lind and Joseph M. Manning, Partners Doing Business under the Firm Name of Lind & Manning, Respondents.	Appeal from Multnomah County.

This cause having heretofore to wit: on the 5th day of November, 1900, been argued and submitted by the attorneys of the respective parties above named and by the court then reserved for further consideration, and the court having duly considered all the questions presented by the transcript herein and the arguments of the respective attorneys thereon, and being now fully advised in the premises finds that there is not error as alleged.

It is therefore considered, ordered, and decreed that the decree in this cause in the court below rendered be and the same hereby is in all things affirmed.

And it appearing that the findings of the court below as to the facts and law are substantially supported by the evidence herein, they are hereby adopted as the findings of fact and conclusions of law of this court.

274 And it appearing therefrom that the appellants are not entitled to the relief prayed for or any part thereof, and that

the suit should be dismissed, it is now therefore further ordered and decreed that this suit be and it is hereby dismissed.

And it appearing that the appellants filed an undertaking for the appeal with E. A. King as surety therein, it is further ordered that the respondents recover of appellants and E. A. King their said surety, their costs and disbursements in this court upon the appeal allowed and taxed at $—.

It is further ordered that the cause be remanded to the said court below and that a decree be there entered and docketed in accordance herewith.

275 STATE OF OREGON, } ss:
County of Marion, }

I, J. J. Murphy, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom, and the whole of such original as the same appears of record, and in my office and custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Salem, Oregon, this 24 day of Dec., 1900.

[Seal of Supreme Court.]

J. J. MURPHY, *Clerk,*
By J. W. REEVES, *Deputy.*

Endorsed: "Filed Dec. 24, 1900, J. J. Murphy, clerk By J. W. Reeves, deputy."

276 A. N. KING, P. J. MANN, A. S. NICHOLS, THE MULTNOMAH Investment Company, a Corporation, and Fred N. Pendleton, Appellants,

v.

THE CITY OF PORTLAND, THE BOARD OF PUBLIC WORKS, THE Common Council of said City, D. H. McLauchlan, Chief of Police; A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works, and M. W. Lind and Joseph M. Manning, Partners Doing Business under the Firm Name of Lind & Manning, Respondents.

Appeal from Multnomah county; Hon. John B. Cleland, judge.

M. L. Pipes, for appellants.
J. M. Long, for respondents.
Wolverton, J.
Affirmed.

Filed Dec. 10 1900.

J. J. MURPHY, *Clerk,*
By —— ——, *Deputy.*

277 This is a suit to enjoin the enforcement of a local assessment for a street improvement, consisting of an elevated roadway extending along East Yamhill street, between East Water street and

Union avenue, in the city of Portland. The charter provisions bearing upon the present controversy (Sess. Laws 1898, p. 150) are, in substance, as follows: Sections 126 and 127 authorize the improvement. Section 128 requires that, before any improvement is made, the common council shall pass a resolution declaring its intention to make it and describing the same, which resolution shall be posted in the office of the auditor and published for ten consecutive days in a daily newspaper of the city, and that the city engineer shall cause to be posted a notice at each end of the line of the contemplated improvement, which shall state the fact of the adoption of the resolution, its date, the character of the improvement proposed, and the time within which written objection or remonstrance may be made thereto. Section 129 provides that, within ten days after the official publication of notice, the owners of more than one-half of the abutting property may file with the auditor written objection or remonstrance, which shall be a bar to further proceedings, unless the owners of one-half or more of such property shall subsequently petition therefor. Section 130: That if no such objection or remonstrance be filed, the council shall be deemed to have acquired jurisdiction to order the improvement to be made, and shall, within four months from the date of the final publication of the resolution of intention, declare by ordinance the time and manner of said improvement. Section 131: That the auditor shall immediately transmit a copy thereof to the board of public works and the city engineer, and said board shall include, as a part of the cost of such improvement, the cost of advertisement, etc. Section 132: That said board shall without delay cause the engineer to prepare and file estimates and specifications of the amount of such work or improvement, and thereupon give five days' notice
278 and invite proposals for doing the work. Section 133: That said board shall at the time set examine the proposals and let the work. Section 136: That the auditor shall make the assessment and apportionment of the expenses of said improvement, in the mode and manner provided by section 138. Section 137: That whenever any improvement, the expense of which is to be assessed against the property benefited thereby, has been completed in whole or in such proportion as shall enable the said board to determine the cost of the whole thereof, the city engineer shall file a written acceptance of the work so completed. Thereupon, the board shall publish a notice of such completion and acceptance for six consecutive insertions in the official newspaper, stating the time and place where written objections to the acceptance of the improvement may be heard. At the time fixed, any owner or agent may appear and file objections to such improvement, which shall be heard and determined by the board, and if it appear that the said improvement has not been completed in accordance with the specifications and contract, it shall not be approved until so completed. When approved, the board shall endorse the same upon the acceptance of the engineer and file a copy with the auditor, together with the contract and the estimated expenses of advertising, etc. Section 138: That the auditor shall thereupon prepare an assessment to cover the

entire cost of such work or improvement, and apportion the same to the property affected thereby within the limits of such work or improvement as declared by the ordinance authorizing the same in the manner following: "Each lot or part thereof within the limits of a proposed street improvement abutting upon the street shall be liable for the full cost of making the same upon half of the street in front of and abutting upon it, and also for a proportionate share of the cost of improving the intersections of two of the streets bounding the block in which such lot or part thereof is situated. * * * The cost of improving
the intersection of streets, unless otherwise ordered by
279 the council, shall be assessed upon the lots or parts thereof situated in the quarters of the four regular blocks adjoining such intersections, but only upon the lots or parts thereof within the quarter blocks nearest thereto and in the following proportion: Five-ninths of the cost to the corner or first fifty feet; and four-ninths of the cost to the lot next inside or the next fifty feet as laid out on the recorded plats." Section 139: That, when the probable cost of the improvement has been ascertained and the proportionate share assessed to each lot, the common council must declare the same by ordinance and direct the auditor to enter a statement in the docket of city liens. Sections 140, 141 and 142 provide for a docket of city liens and the entry of the assessment therein, but that the same shall not be collected until by order of the common council, that ten days' notice shall be given of the entry, and that, if within thirty days from the first publication of such notice the sum assessed is not wholly paid, the council shall thereafter order the issuance of a warrant to enforce the collection of the same. Section 158: That "the proceedings authorized by this chapter for the establishment or alteration of a grade or the improvement of a street or any part thereof may be taken or had without giving notice prescribed in section 128, whenever the owner or owners of two-thirds of the adjacent property shall, in writing, petition the council therefor. And whenever any street or part thereof shall be in such condition as to become impassable, unsafe or dangerous to persons or teams passing on, along or over the same the council may declare the same by resolution, and may thereupon cause the improvement of such street to be made, upon giving ten days' notice by publication in any paper of said city, and no remonstrance shall be heard thereto."

The decree of the court below being in favor of the defendants, the plaintiffs appeal.

280 WOLVERTON, *J.*:

Several objections are interposed, directed against the legality of the assessment. The first is that the charter provisions under which it was made do not provide for an apportionment of the burden under a uniform rule, such as is required by the Constitution. There is much discussion in the books as to whether an assessment for local improvements is a tax, or not, but, whatever may be the true doctrine, it must be conceded that the authority to make such an assess-

ment is necessarily lodged in the taxing power. This has been held so often that the controversy must be regarded as closed: Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, 176.

Apportionment of the burden is, however, essential, though it need not be made upon property in proportion to its value. Mr. Cooley says: "But whatever may be the basis of the taxation, the requirement that it shall be uniform is universal. It applies as much to these local assessments as to any other species of taxes. The difference is only in the character of the uniformity, and in the basis on which it is established:" Cooley, Const. Lim., (6 ed.) 615. Mr. Justice Earl, in Stuart *v.* Palmer, 74 N. Y. 183, states the proposition as follows: "It is not disputed that the legislature has unlimited power (except as restrained by the Federal Constitution) to impose taxes and assessments for public purposes. It may impose taxes upon all property within the State; and in such cases the owners are supposed to receive a compensation for the burdens thus imposed in the protection and benefits of the government under which they live. It may impose taxes upon the local divisions of the State for the purposes of local government, and all the citizens residing in the locality must bear the burdens, as they all receive the benefits of the local government. It may cause or authorize local improvements to be made and authorize the expense thereof to be assessed upon the land benefited thereby. But in all cases there must be apportionment of the burdens, either among all the property-owners
281 of the State, or of the local division of the State, or the property-owners specially benefited by the improvements. In either case, if one is required to pay more than his share, he receives no corresponding benefit for the excess, and that may properly be styled extortion or confiscation. A tax or assessment upon property arbitrarily imposed, without reference to some system of just apportionment, could not be upheld."

This brings us to the rule of apportionment, and in this connection may be considered the second objection, which is that the mode and manner of assessment for street improvements adopted and prescribed by the legislature through the city charter do not take into consideration the benefits or limit or apportion the assessment by and in accordance with the benefits received, and, therefore, that the charter is in violation of the fifth and fourteenth amendments to the National Constitution, which inhibit the taking of private property for public use and without due process of law. Our State constitution has similar provisions (art. 1, §§ 10, 18), so that if the rule is in violation of one, it is also in conflict with the other. The case has been presented, however, by the allegations of the complaint and at the argument with special reference to the Federal question, and we will treat it more particularly in that light, for, if the legislative act prescribing the manner and mode of assessment is void under the National Constitution, within the doctrine of the supreme judicial court of the United States, then we are precluded, as it is the final arbiter in the premises.

It is asserted with substantial unanimity and great clearness by the courts in this country, as well as by text-writers of erudi-

tion and learning, that, unless the nature of the case precludes it, the power to determine the confines of a taxing district for any particular burden is purely one of legislative discretion, and that the question of benefits accruing by reason of improvements contemplated is regarded as one of fact, which the legislature
282 is always presumed to have considered and settled by the enactment. Mr. Justice Finch, in Spencer *v.* Merchant, 100 N. Y. 585, a case involving the validity of an act whereby certain real property situated in a prescribed district, which had not theretofore paid an assessment for a local improvement under an act declared to be void, was required to pay a sum of money then ascertained, says: "The act of 1881 (the one in question) determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. * * * The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so, and may settle both questions for itself; and when it does so its action is necessarily conclusive and beyond review." This case went to the Supreme Court of the United States (8 C., 125 U. S. 345), and the doctrine thus promulgated was there directly approved and affirmed in the following language, Mr. Justice Gray speaking for the court: "In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of the commissioners." So, in Fallbrook Irrigation District *v.* Bradley, *supra*, the court says: "The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have
283 finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question." In further support of the doctrine, see, Cool. Tax. (2 ed.), 640; King *v.* City of Portland, 2 Or. 146; Lent *v.* Tillson, 140 U. S. 316; Williams *v.* Eggleston, 170 U. S. 304; People *v.* Mayor &c. of Brookland, 4 N. Y. 419; Litchfield *v.* Vernon, 41 N. Y. 123.

As has been indicated by some of the foregoing references to the authorities, the legislature may, instead of fixing and prescribing the taxing district itself, refer the matter to commissioners or local boards or bodies for their ascertainment and determination; and, in such case, the substituted bodies possess and exercise legislative functions, and their action must be deemed as conclusive upon the subject as if the legislature had exercised the authority directly:

Cool. Tax. (2 ed.), 640. The doctrine is laid down in Williams *v.* Eggleston, *supra*, as follows: "Neither can it be doubted that, if the State constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited." See, also, Spencer *v.* Merchant, *supra*; Dickson *v.* City of Racine, 61 Wis. 545.

The question of apportionment between the owners when the authority is delegated is quite a different thing. In such case, the commissioners or body to which the duty is entrusted act quasi judicially, and there must be notice and an opportunity to be heard before the owner can be finally precluded and his property subjected to the payment of the assessment: Sears *v.* Street Com-
284 missioners, 173 Mass. 350, 355, and authorities there cited. See, also, 2 Dill. Mun. Cor. (4 ed.) § 802*a*.

The manner of notice and the specific period of time in the proceedings when he may be heard are not very material, so that reasonable opportunity is afforded before he has been deprived of his property or the lien thereon is irrevocably fixed. So it has been held that it is sufficient if the party is accorded the right of appeal or to be heard upon an application for abatement (see Towns *v.* Klamath County, 33 Or. 225; Weed *v.* Boston, 172 Mass. 28), or the assessment is to be enforced by a suit to which he is to be made a party (Hagar *v.* Reclamation District No. 108, 111 U. S. 701; Walston *v.* Nevin, 128 U. S. 578), or the right of injunction against collection is accorded, by which the validity of the assessment may be judicially determined (McMillen *v.* Anderson, 95 U. S. 37). In such case, he cannot be heard to complain that his property is being taken without due process of law. The case of Paulsen *v.* Portland, 149 U. S. 30, covers the question of the right to notice and a hearing quite fully, and it is significant that special reference is made to the ten days' notice required to be given under section 104 of the charter as it then stood, after the assessment had gone upon the docket of city liens and before collection can be proceeded with, which is almost the exact provision now contained in section 141. While the court at the time declined to decide that such a notice was sufficient, yet, if the cause had been dependent upon it alone, it is not altogether clear that it would have held it insufficient. So it was held by this court, in conformity with the prevailing rule, that if provision is made for notice to and hearing of each proprietor at some stage of the proceeding upon the question of what proportion of the tax shall be assessed upon his land, there is not a taking without due process of law: Wilson *v.* City of Salem, 24 Or. 504.

The principle upon which is based the authority to take
285 money as a tax for public use is that the tax-payer receives or is supposed to receive a just remuneration in the protec-

tion which the Government affords to life, liberty and property, and in the increase in the value of possessions which comes from the use to which the money raised by the tax is applied: Cool. Con. Lim. (6 ed.), 613. Local or special assessments for local improvements stand upon a different basis. They are made and sustained upon the assumption that a prescribed portion of the community is to be especially benefited in the enhancement of the value of the property peculiarly situated as regards the proposed expenditure of the funds to be raised by the assessment. It is but a demand of simple justice that special contributions in consideration of special benefits should be made by those receiving the benefits, but such contributions ought not, by the same demand of justice, to be enforced in any case beyond the benefits received: Cool. Tax. (2 ed.), 606. Such an assessment is not in conflict with the provision of our State constitution requiring that "all taxation shall be equal and uniform:" Art. 1, § 32; King *v.* City of Portland, *supra*. It must be conceded, therefore, as was said by Mr. Justice Harlan (in Norwood *v.* Baker, 172 U. S. 269, 279), that "the exaction from the owner of private property of the cost of — public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." The eminent jurist used the words "substantial excess" advisedly, because, as he explains, "exact equality in taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." Judicial authority, were it necessary, is not lacking elsewhere in support of the doctrine. "The whole theory of local taxation or assessment," say the supreme court of
286 Missouri (in McCormack, adm'r, *v.* Patchin, 53 Mo., 33), "is, that the improvements, for which they are levied, afford a remuneration in the way of benefits. A law which would attempt to make one person or given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation." So, in State *v.* Hoboken, 36 N. J. L., 291, it was held that, to the extent of the excess of an assessment above benefits accruing by reason thereof, it was a taking of private property for public use without compensation, because that received by the owner was not equal to that taken from him. And, again, in Dexter *v.* City of Boston, 57 N. E. (Mass.) 379, a recent case, the court say: "It is now settled law in this court, as it is in the Supreme Court of the United States and in many other courts, that after the construction of a public improvement a local assessment for the cost of it cannot be laid upon real estate, in substantial excess of the benefit received by the property. Such assessments must be founded on the benefits, and be proportional to the benefits," citing the Norwood case, and, among others, Sears *v.* Street Commissioners, *supra*, wherein the court say that "it is well established that taxation of this kind is permissible under the constitution of this Commonwealth and under

the Constitution of the United States only when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then only to an amount not exceeding such special and peculiar benefits." This marks the boundary, beyond which it is not within the power of the legislature to go, even in the determination of benefits as applied to a prescribed district. When, however, it is plainly and palpably manifest from the surroundings, that is, from the physical condition of the property involved, its locality, the character of the work or improvement, the assessment, and from the very nature of things, that such
287 an assessment is not adapted to the purpose, and is requiring of the owner a contribution to which he should not be subjected in that capacity, the court will interfere to prevent a consummation of the injustice.

But we are more concerned with the manner of apportionment as between owners within the assessment district. In this, as in prescribing the district, the legislature has a discretion commensurate with the broad domain of legislative power: 2 Dill. Mun. Cor. (4 ed.), § 761, subd. 4. The mode which the legislature has prescribed is, in substance, that the cost of the half street in front shall be assessed upon the abutting lot or part of lot, and that the cost of street intersections shall be assessed, five-ninths upon the corner lot, and the remainder upon the adjacent lot in the quarter block. The rule is invariable, and, when the cost of the improvement in front or at an intersection is ascertained, it must be assessed upon the property; and no discretion, legislative or judicial, abides with the municipal authorities to modify or abate it in the slightest measure. The method is, perhaps, the least justifiable, as a general rule, of any that has been devised; but that does not signify that it is not proper in any case. The Norwood case would seem, at first thought, to forbid the application under all conditions of the front-foot rule; but it was probably not intended that it should be so far reaching in its significance. As applied to that case, and all similar cases, it must be accepted as controlling. The rule has been many times upheld, and it is believed it yet may be, where the conditions are such that it may reasonably be supposed that the method adopted will secure a proportional distribution of the burden according to the benefits. Thus, in Sears *v.* Board of Aldermen, 173 Mass. 71, an assessment for sprinkling a street was sustained by the rule, because it did not appear that as applied to the property assessed it was not an approximately accurate method of determining benefits. In the opinion, the proposition is stated
288 that, "while these assessments must be founded upon benefits, the courts have generally recognized the difficulty, and in many cases the impracticability, of attempting to estimate benefits to estates one by one without some rule or principle of general application which will make the assessments reasonable and proportional, according to the benefits. Accordingly, the determination of such a rule or principle by the legislature itself, or by the tribunal appointed by the legislature to make the assessments, has commonly been upheld by the courts. If, however, its effect plainly

is to make an assessment upon any estate substantially in excess of the benefit received, it is set aside." This case was decided March 3, 1899, since the announcement of the Norwood case. In the September prior, the same court decided the case of Weed *v.* Boston, *supra*, wherein it was held that assessments according to frontage of lots on a strip of private land taken for a sewer may be so grossly disproportionate to the benefits received by the land from the sewer, that a statute authorizing them is unconstitutional. The court say: "The weight of authority is that an assessment according to the frontage of lots abutting upon a street or a public way in a city sometimes may be a reasonable mode of making an assessment for the cost of constructing a sewer in such street or way because of the similarity of the lots, but that such an assessment when the sewer is not constructed in a street or way or is constructed in the country where the lots abutting are not laid out as building lots, often would be unreasonable." In the May following the announcement of the case of Sears *v.* Board of Aldermen, *supra*, another case was decided, entitled Sears *v.* Street Commissioners (173 Mass. 350), whereby it was held that an act purporting to give the street commissioners power to levy a local assessment for a burden that was clearly general in its character and that ought to be borne by the State at large, was invalid. And, a year later, the decision of Dexter *v.* City of Boston, (57 N. W. 380), was handed down, which holds that the rule is
289 vicious as applied to the construction of a sewer which, by reason of its turning at right angles upon plaintiff's lot, imposed a double burden (being assessed upon the two sides) as compared with other lots. The rule was applied by the common council and upheld in Wilson *v.* City of Salem, *supra*, upon the ground that the legislative judgment of the council had settled the matter as being an appropriate measure of benefits in that case. The only basis upon which any devised method can be sustained is that it is reasonably calculated to the promotion of a substantial proportional distribution of the burden according to benefits. Mr. Dillon says: "The legislature has, within legislative limits, a discretion in providing the mode of ascertaining the benefits; but even in the absence of express constitutional restriction, its power is not unlimited. This ascertainment may be made, and usually is, by a separate and actual estimate of special benefits. But where the lots in a town or city are small, of the same depth, and similarly situated, an ascertainment, under the conditions mentioned in a previous section, may be authorized on the basis of frontage, which is a convenient substitute for an actual estimate; but this mode cannot be authorized where it must inevitably operate with manifest inequality, as will often be the case with rural or suburban property, or where from the circumstances it is clear that it is legally impossible that an apportionment of the cost on this basis can be just or equal, or approximately so, and where injustice must certainly result from its adoption. The same general principle applies to an assessment upon the basis of superficial area; and, therefore, where an assessment in this mode was authorized to be made, and was made equally upon lands remote from the sewer and only slightly benefited, with no pro-

vision securing the right to connect with it, and upon lots fronting on the sewer and greatly benefited, the court considered the mode so arbitrary, so certain to work injustice, so flagrantly opposed to the principle of contribution in proportion to benefits, as
290 to be unconstitutional:" 2 Dill. Mun. Cor. (4 ed.) § 989. So it was held upon like principle by this court that an assessment for a local improvement upon property not at all benefited, although within the taxing district, would be annulled, as it would amount to a taking without due process of law: Oregon & California R. Co. *v.* Portland, 25 Or. 229. The same idea pervades the judicial utterances of the Supreme Court of the United States. Parsons *v.* District of Columbia (170 U. S. 45) is a case wherein Congress by legislative enactment provided for a comprehensive system of water supply in the District of Columbia through street mains, and that the assessment for such purpose should be levied upon abutting lots or property at the rate of one dollar and twenty-five cents per foot front. It was objected that the system adopted did not afford the owner an opportunity to be heard upon the question of costs, benefits, or apportionment, and that the assessment was not made upon the basis of benefits to the property assessed. But the court held, Mr. Justice Shiras announcing the opinion, that none of the objections were well taken. "Our conclusion," it was said, "is that it was competent for Congress to create a general system to store water and furnish it to the inhabitants of the District, and to prescribe the amount of the assessment and the method of its collection; and that the plaintiff in error cannot be heard to complain that he was not notified of the creation of such a system or consulted as to the probable cost thereof. He is presumed to have notice of these general laws regulating such matters. The power conferred upon the commissioners was not to make assessments upon abutting properties, nor to give notice to the property-owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and water pipes, and of erecting fire plugs and hydrants, and their *bona fide* exercise of such a power cannot be reviewed by the courts." The opinion quotes from 2 Dill. Mun. Cor. (4 ed.) § 752, as follows: "Whether the expense
291 of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency." The Norwood case distinguishes this by the significant observation that "there is no such disproportion between the amount assessed and the actual cost as to show any abuse of legislative power." In Bauman *v.* Ross, 167 U. S. 548, decided in 1895, it was said: "The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by

commissioners." See, also, Mattingley *v.* District of Columbia, 97 U. S. 687. Walston *v.* Nevin, *supra*, is very similar, as respects the matters in controversy, to the case at bar. The statute prescribing the manner of making assessments is as follows: "When the improvement is the original construction of any street," etc., "such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the general council according to the number of the square feet owned by them respectively, except that corner lots * * * shall pay twenty-five per cent. more than others for such improvements. Each subdivision of territory bounded on all sides by principal streets shall be deemed a square." An assessment made in pursuance of the statute was attacked as in conflict with the fourteenth amendment of the national Constitution, but it was upheld, the court saying: "The statute has been repeatedly before the Kentucky court of appeals, which has sustained it as constitutional and proper legislation, the powers vested
292 thereby in the local government being subjected to the supervision of the courts, where the particular facts in each case can be examined, and the controversy determined by those rules and principles which have always governed courts in dealing with questions of assessment and taxation;" citing Preston *v.* Roberts, 12 Bush. 570; Beck *v.* Obst, *id.* 268; Broadway Baptist Church *v.* McAtee, 8 Bush. 506. Further on in the opinion, the court cites Davidson *v.* New Orleans, 96 U. S. 97. After quoting from the opinion of Mr. Justice Miller, it draws the conclusion therefrom "that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the State authorities are controlled by the Federal Constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power. * * * And whenever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied." The same principle is maintained in the case of Washington avenue, 69 Pa. St. 352, where it was held, Mr. Justice Agnew rendering the opinion, that it was incompetent for the legislature to create a district mainly in rural domain for the construction of an artificial road seven miles long, the expense to be paid by assessments upon lands within the district. It was apparent from the very nature of things that the road was a general public benefit for which a local assessment could not be maintained, and in this respect was like the case of Sears *v.* Street Commissioners, *supra*. In the course of the opinion it was said: "Taxation, according to the benefits received, is neither unequal nor unjust, and cannot, therefore, come into
conflict with those clauses in the bill of rights, which
293 regard as sacred the right of private property. So long, therefore, as a law faithfully and reasonably provides for a

just assessment according to the benefits conferred, and does not impose unfair and unequal burdens, it cannot be said to exceed the legislative power of taxation, when exercised for proper objects. It is on this ground only that assessment according to the frontage of property on a public street to pay for its opening, grading and paving, is to be justified. As a practical result, in cities and large towns, the per foot-front mode of assessment reaches a just and equal apportionment in most cases. Hence this mode has been deemed a reasonable exercise of the taxing power in such places, with a view to taxation according to the benefits received. Whatever doubt might have been originally entertained of it as a substitute, which it really is, for actual assessment by jurors or assessors under oath, it has been so often sanctioned by decision, it would ill become us now to unsettle its foundation by disputing its principle. But it is an admitted substitute, only because practically it arrives, as nearly as human judgment can ordinarily reach, at a reasonable and just apportionment of the benefits on the abutting properties. Hence the fairness of the rule of charging benefits by frontage was a conceded point in Hammett *v.* City of Philadelphia, 15 P. F. Smith 155. But this rule, as a practical adjustment of proportional benefits, can apply only to cities and large towns, when the density of population along the street, and the small size of lots make it a reasonably certain mode of arriving at a true result." See, also, Cleveland *v.* Tripp, 13 R. I. 50; Raleigh *v.* Peace, 110 N. C., 32; Allen *v.* City of Davenport, 77 N. W. (Iowa) 532. Since the decision of the Norwood case, assessments by the front-foot rule have been sustained in several of the States of the Union. In the case of Cass Farm Co. *v.* City of Detroit, 83 N. W. (Mich.) 108, which involved a street pavement, in the course of the opinion the court quotes from Mr. Justice Cooley, in Sheley *v.* City of
294 Detroit (45 Mich. 431), as follows: "We might fill pages with the names of cases decided in other States which have sustained assessments for improving streets, though the apportionment of cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country, the power of the legislature to permit such assessments, and to direct an apportionment of the cost by frontage, should by this time be considered as no longer open to controversy. Writers on constitutional law, municipal law, and on the law of taxation have collected the cases, and have recognized the principle as settled; and, if the question were new in this State, we might think it important to refer to what they say. But the question is not new. It was settled for us thirty years ago." But the court distinguished the case from that of Norwood *v.* Baker, on the ground that it was for paving a street, while that was for street-opening purposes, and refused to disturb the rule that had been so long followed in the State. In Indiana it was sustained in Adams *v.* City of Shelbyville, (57 N. E. 114). The case involved a stone curbing, where what is known as the Barrett law was upheld. The rule was also sustained in North Dakota, in Webster *v.* City of Fargo (82 N. W. 732), an assessment for street paving; in Minnesota, in State *v.* District Court (83 N. W.

183), also for street paving; in Missouri, in Heman *v.* Allen (57 S. W. 559) and Barber Asphalt Paving Co. *v.* French (58 S. W. 934), the former of which involved a sewer assessment and the latter the pavement of a street; in New York, by the court of appeals, in Conde *v.* City of Schenectady (58 N. E. 130), a street-paving case, and in California, in Hadley *v.* Dague (62 Pac. 500), for street improvement. Texas has condemned the rule unqualifiedly (Hutcheson *v.* Storrie, 45 L. R. A., 289), and the Federal circuit courts are uniform in their holding to the same purpose: Fay *v.* City of Springfield, 94 Fed. 409; Loeb *v.* Trustees of Columbia T'p, 91 Fed. 37; Charles *v.* City of Marion, 98 Fed. 166; Cowley *v.* City of
295 Spokane, 99 Fed. 840; Charles *v.* City of Marion, 100 Fed. 538.

But we are inclined to believe that the better doctrine, deducible from adjudged cases, including those of the Supreme Court of the United States, is that the assessment will be upheld wherever it is not patent and obvious from the nature and location of the property involved, the district prescribed, the condition and character of the improvement, the cost and relative value of the property to the assessment, that the plan or method adopted has resulted in imposing a burden in substantial excess of the benefits, or disproportionate within the district as between owners. This must be so logically and necessarily, in view of the broad latitude accorded the legislature in its discretion to prescribe the taxing district and the manner and method of making the assessment within the district as it concerns individual owners and proprietors. As the writers say, the authority of the legislature in these respects is almost without limit; yet that there is a limit beyond which it cannot go all will concede. When, however, it has exercised its legislative discretion and prescribed a district and adopted a method, it ought to be plain and indisputable that it has exceeded its constitutional authority before the court should undertake to set at naught its declared will.

Neither ought the system to be condemned because there may be exceptions wherein it would work a legal injury to enforce it. If such an exception arises, as was the case in Oregon & California R. Co. *v.* Portland, *supra*, the court will not enforce it; but it will hesitate long to condemn the rule because of the exception. The rule upon which the assessment is made in the present case has been upheld in several jurisdictions: Warren *v.* Henly, 31 Ia. 31; Gatch *v.* City of Des Moines, 63 Ia. 718; Sands *v.* City of Richmond, 31 Gratt. 571; White *v.* The People, 94 Ill. 604. Upon this subject Mr. Dillon observes: "It may be true that in some instances more hardship will be occasioned by requiring each owner to make or pay
296 for the improvement in front of his own property than if the cost were assessed on the basis of frontage or of supposed benefits received; still, it seems to the author difficult to find satisfactory and solid ground on which to discriminate the cases so as to hold that one is within the constitutional power of the legislature and the other is not:" 2 Dill. Mun. Cor. (4 ed.) § 753.

Now let us look at the law, and ascertain, if we can, whether it is legally sustainable upon principle. The common council is empowered by the legislature to fix and determine the taxing district.

This it did by adopting the resolution of intention to make the improvement. Its action in this regard is legislative in character, and it was not requisite that the legislature should have provided for notice before the council was authorized to act. In prescribing the district, it must be presumed, as would have been the case if the legislature had itself acted directly, that it took into consideration the exceptional benefits that would accrue to the property which it was intended should be charged with the burden, because it could inaugurate or make such an assessment upon no other basis. A notice in the present instance was required by the charter, and given, however, and, while it was for the purpose of acquiring jurisdiction, it gave the property-holders an opportunity to appear and file objections to the improvement; and it was perfectly competent for them to raise both the objection that as a district the costs would be in excess of the exceptional benefits to the property involved, and that as it respects individual holders and between themselves the assessment would not be proportional to the relative benefits to be derived from the improvement. This is what, in fact, was done by the plaintiffs, as shown by the record, and upon this issue they were accorded a hearing. It was also possible for the common council to determine the matter with reasonable accuracy, as the probable cost and distributive share thereof among the holders was known to them, as was also the locality and situation of the
297 property to be assessed. The manner adopted for the assessment of the costs and expenses against the respective lots is wholly legislative in its nature. The common council is accorded no discretion, but is to make the assessment as directed by the charter. Its function in that respect is clerical, merely, as no choice is lodged with it to vary the rule adopted. Such being the nature of the assessment, no notice or hearing would seem to be requisite under Parsons *v.* District of Columbia, *supra.* But the charter afforded an opportunity to be heard sufficient under other authorities to support the assessment. There are four several notices required along the way: First, of the proposed improvement; second, inviting proposals for doing the work; third, touching the acceptance of the work; fourth, ten days' notice of the entry of the assessment in the docket of city liens. Ample opportunity was thus afforded the owners to appear and interpose the constitutional objections, which is all that is sought to be done in this proceeding. The improvement consists of an elevated roadway, ranging from ten to fifteen feet in height throughout, except at one intersection, which was a fill, and it is apparent that the cost of the work was practically uniform, throughout, and the assessment against the lots was, therefore, as nearly proportional according to benefits as could be devised. At least, it is not apparent that there is any substantial excess of costs above benefits, nor is there such a disproportionate distribution of the burden as to justify the court in declaring the assessment an arbitrary exaction by the legislature. It is beyond the power of human ingenuity to adopt any plan or mode of assessment that will operate to produce exact uniformity, and all that may be expected is a reasonable approximation to such a standard, and the rule adopted under the

charter fulfills the condition as applied to the present controversy. There is no doubt that the property was benefited in excess of the costs and expenses.

298 These considerations affirm the decree of the court below, and sustain as valid the assessment involved by the proceeding.

We have arrived at this conclusion not without some misgivings. But, in view of the fact that the manner of the assessment as here found to exist has been followed substantially in its present form since 1864 (see published charter of the city of Portland of 1872), that many miles of street improvements in various forms have been made and constructed in pursuance of it, that hundreds of thousands of dollars have been expended under the rule, that numerous titles are depending upon it, and to that extent it has become a rule of property, that tax bills issued in pursuance of it are bought and sold in the market upon the faith of it, that many bonds are outstanding depending for their validity upon its legality, and that it has time and time again been before the courts of the State and sustained, although not upon the exact points here involved (which was never mooted until after the decision in the Norwood case), we deem it unwise at this late date to disturb it, and set the whole matter at large as if there had never been a law upon the subject, thus unsettling the financial autonomy of the city government, and perhaps many titles within its domain. It would be far better that the legislature should change the procedure than that we should nullify it *ab initio*, with a long train of evils certain to follow in its wake; and to that source of power resort should be had, if an evil exists, for its reparation. Where a law is clearly without the pale of the constitution, State or national, the courts will not hesitate to declare it void. But, unless it so appears, or where a reasonable doubt exists, it should be resolved in favor of upholding the will of the legislature, which department of the government is as much bound by the letter of the constitution as the judiciary, and is always presumed to have acted within its authority.

299 In the Supreme Court of the State of Oregon.

A. N. KING, P. J. MANN, A. S. NICHOLS, THE Multnomah Investment Company, a Corporation, and Fred N. Pendleton, Plaintiffs and Appellants,

vs.

THE CITY OF PORTLAND, THE BOARD OF PUBLIC Works, The Common Council of said City, D. H. McLaughlin, Chief of Police, and A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works, and W. M. Lind and Joseph M. Manning, Partners Doing Business under the Firm Name of Lind & Manning, Defendants and Respondents.

Petition for Writ of Error.

To the Honorable Robert S. Bean, chief justice of the supreme court of the State of Oregon:

And now come A. N. King, P. J. Mann, A. S. Nichols, The Multnomah Investment Company, a corporation, and Fred N. Pendleton, appellants, by Martin L. Pipes and A. P. Tifft their attorneys, and say that on or about the 10th day of December, 1900, the said supreme court rendered and entered a judgment and decree in the above-entitled court in the above-entitled cause in favor of the above-named defendants and against the appellants, in which judgment and decree and the proceedings had prior thereunto in this cause,

300 certain errors were committed, to the prejudice of these plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, these plaintiffs pray that a writ of error may issue in this behalf to the Supreme Court of the United States, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the said Supreme Court of the United States.

MARTIN L. PIPES,
ARTHUR P. TIFFT,
Attorneys for Petitioners.

301 [Endorsed:] Original. No. —. In the supreme court of the State of Oregon. A. N. King, *et al.* plaintiffs & app'lts. *vs.* City of Portland, *et al.* defendants & resp. Petition for writ of error. Pipes & Tifft, 708–711 Chamber of Commerce, Portland, Oregon, attorneys for petitioners.

302 In the Supreme Court of the State of Oregon.

A. N. KING, P. J. MANN, A. S. NICHOLS, THE MULTNOMAH INVESTment Co., a Corporation, and Fred N. Pendleton, Plaintiffs and Appellants,

vs.

THE CITY OF PORTLAND, THE BOARD OF PUBLIC WORKS, THE Common Council of said City, D. H. McLaughlin, Chief of Police; A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works, and W. M. Lind and Joseph M. Manning, Partners Doing Business under the Firm Name of Lind & Manning, Defendants and Respondents.

Know all men by these presents, that we, A. N. King, P. J. Mann, A. S. Nichols, the Multnomah Investment Co., a corporation, and Fred N. Pendleton as principals, and E. A. King and N. A. King as sureties, are held and firmly bound unto the defendants, The City of Portland, The Board of Public Works, The Common Council of said city, D. H. McLaughlan, chief of police, A. N. Gambell, auditor of said city and clerk of the board of public works and W. M. Lind and Joseph M. Manning, partners doing business under the firm name of Lind & Manning, in the full and just sum of five hundred dollars to be paid to the said defendants, their certain attorneys, executors, administrators and assigns, to which payment, well
303 and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of February, 1901 in the year of our Lord, one thousand nine hundred and one.

Whereas, lately at the supreme court of the State of Oregon in a suit depending in said court between A. N. King, P. J. Mann, A. S. Nichols, The Multnomah Investment Company, a corporation, and Fred N. Pendleton, plaintiffs, and The City of Portland, The Board of Public Works, The Common Council of said City, D. H. McLaughlan, chief of police, A. N. Gambell, auditor of said city, and clerk of the board of public works and W. M. Lind, and Joseph N. Manning, partners doing business under the firm name of Lind & Manning, a decree was rendered against the said plaintiffs and the said plaintiffs having obtained a writ of error to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of the said supreme court of Oregon, to reverse the decree in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a session of the Supreme Court to be holden at the city of Washington, District of Columbia *on the* within sixty days from the date of said writ *next*.

Now the condition of the above obligation is such that if the said A. N. King, P. J. Mann, A. S. Nichols, the Multnomah Investment Company, a corporation and Fred N. Pendleton, shall prosecute said writ of error to effect and answer all damages and costs if they fail

to make said plea good, then the above obligation to be void, else to remain in full force and virtue.

304 A. N. KING, [SEAL.]
P. J. MANN, [SEAL.]
A. S. NICHOLS, [SEAL.]

[Seal Multnomah Investment Company, Portland, Oregon.]

MULTNOMAH INVESTMENT CO.,
By D. G. DUNCAN, *Sec'y*, [SEAL.]
By Order of Directors,
FRED N. PENDLETON, [SEAL.]
Principals.
E. A. KING, [SEAL.]
N. A. KING, *Sureties.* [SEAL.]

Sealed and delivered in the presence of

J. C. W. DALY.
A. H. LARSON.

STATE OF OREGON, } ss:
County of Multnomah, }

We, E. A. King and N. A. King whose names are subscribed to the within undertaking as sureties, being duly sworn, each for himself, say: That I am a resident and freeholder within the State of Oregon, and am not a counsellor or attorney at law, sheriff, clerk or officer of any court, and am worth the sum of ten hundred ($1,000.00) dollars, over and above all debts and liabilities, and exclusive of property exempt from execution.

E. A. KING,
N. A. KING, *Sureties.*

Subscribed and sworn to before me this 14th day of February 1901.

[Seal of A. P. Tifft, Notary Public, State of Oregon.]

A. P. TIFFT,
Notary Public for Oregon.

305 Approved by
R. S. BEAN,
Chief Justice of the Supreme Court of State of Oregon.

[Seal Supreme Court, State of Oregon.]

Attest: J. J. MURPHY,
Clerk Supreme Court of the State of Oregon.

306 [Endorsed:] Original. No. —. In the supreme court of the State of Oregon. A. N. King, *et al*, plaintiff-, *vs.* City of Portland, defendant. Bond. Filed Feb'y 16th 1901. J. J. Murphy clerk, by —— —— deputy. Pipes & Tifft, 708–711 Chamber of Commerce, Portland, Oregon, attorneys for pl'tiffs.

307 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

To The City of Portland, The Board of Public Works, The Common Council of said City, D. H. McLaughlan, chief of police; A. N. Gambell, auditor of said city and clerk of the board of public works, and W. M. Lind and Joseph M. Manning, partners doing business under the firm name of Lind & Manning, defendants, and to J. N. Long and R. I. Dunlway, your attorneys, Greeting:

Whereas, A. N. King, P. J. Mann, A. S. Nichols, The Multnomah Investment Company, a corporation, and Fred N. Pendleton, plaintiffs, have lately appealed to the Supreme Court of the United States from a decree rendered in the supreme court of the State of Oregon, in your favor, and have given the security required by law; you are therefore hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington within sixty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Salem, Oregon, in said district, this 6th day of March, 1901.

R. S. BEAN,
Chief Justice, Oregon Supreme Court.

[Seal Supreme Court, State of Oregon.]

Attest: J. J. MURPHY,
Clerk Oregon Supreme Court.

308 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

Due and legal service of the within citation is hereby accepted this 7th day of March, 1901.

J. M. LONG,
Of Attorneys for Defendants.

309 [Endorsed:] Original In the Supreme Court of the United States. A. N. King, P. J. Mann, A. S. Nichols, The Multnomah Investment Co., a corporation, and Fred N. Pendleton, plaintiffs, *vs.* The City of Portland, The Board of Public Works, The Common Council of said City, D. H. McLaughlan, chief of police, A. N. Gambell, auditor of said city and clerk of the board of public works, and W. M. Lind and Joseph M. Manning, partners under the firm name of Lind & Manning, defendants. Citation. Filed March 8 1901 J. J. Murphy clerk Pipes & Tifft, attorneys-at-law 708–711 Chamber of Commerce, Portland, Oregon.

310 In the Supreme Court of the State of Oregon.

A. N. KING, P. J. MANN, A. S. NICHOLS, THE MULTNOMAH Investment Co., a Corporation, and Fred N. Pendleton, Plaintiffs and Appellants,

vs.

THE CITY OF PORTLAND, THE BOARD OF PUBLIC WORKS, THE Common Council of said City, D. H. McLaughlin, Chief of Police; A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works, and W. M. Lind and Joseph M. Manning, Partners Doing Business under the Firm Name of Lind & Manning, Defendants and Respondents.

The appellants and plaintiffs in connection with their petition for a writ of error, make the following

Assignment of Errors.

1st. The court erred in holding that the act of the Legislative Assembly of the State of Oregon, entitled, "An act to incorporate the city of Portland and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith" enacted at the session of 1898, and filed in the office of the secretary of state, Oct. 17, 1898, and particularly chapter thirteen thereof relating to streets—their grades and improvements comprising sections 126 to 159 thereof inclusive, is not in conflict with the following provisions of
311 the constitution of the State of Oregon, to wit: art. 1, sec. 18, in this, that said charter provides for the taking of private property for public use without just compensation, and with article 1 section 10 thereof in this, that the plaintiff by said charter is deprived of his remedy by due course of law for the injury done him in person and property by the said assessment, and also with article 9, section 1, in this, that the said law does not provide for uniform and equal rate of assessment and taxation for said improvements and does not prescribe such regulations as secure a just valuation for said taxation of the property effected by said assessments. And article 1, section 32 of the said constitution of the State of Oregon, in this, that the taxation provided for in such charter is not equal and uniform.

2. The court erred in deciding that the said charter of the city of Portland, and the sections thereof, enumerated in assignment No. 1, are not in conflict with the fourteenth amendment of the Constitution of the United States, in this, that they provide for the taking of plaintiffs' property without due process of law; and also in conflict with the fourteenth amendment of the Constitution of the United States, in that they provide for taking plaintiffs' property without just compensation.

3. The court erred in holding that notice to the plaintiff was not necessary before the said common council could make a valid assessment for the said repairs against its property.

4. The court erred in holding that the plaintiff had notice before said assessments were made.

5. The court erred in holding that section 138 of said charter is not in conflict with the fourteenth amendment to the Constitution of the United States prohibiting a State from depriving any person of his property without due process of law and without com-
312 pensation, in providing for the assessment of the whole cost of improving or repairing the half street in front of each lot or parcel of land upon said lot or parcel, and in providing that the whole cost of repairing or improving the intersection of streets shall be assessed upon the lots or parts thereof within the quarter blocks nearest thereto in the proportion of five-ninths to the corner or first fifty feet, and four-ninths to the lot next inside or the next fifty feet.

6. The court erred in holding that section 139 is not in conflict with the said provisions of the said fourteenth amendment, in providing that the common council shall declare by ordinance the probable cost of said work or improvements as ascertained under the provisions — section 138, and enter the same in the city lien docket, and without providing or permitting any notice to the property-owner of his proportion of said assessment or providing or permitting any tribunal or hearing before any tribunal to question the just amount of his assessment or the amount of his special benefits.

7. The court erred in holding that sections 140 and 141 of said charter are not in conflict with said provisions of said fourteenth amendment, in providing that such assessments so declared and entered in the city lien docket, shall be a lien on the property entered therein.

8. The court erred in holding that the notice required to be given of the proposed improvement by section 128 of said charter and referred to in sections 129 and 130 is a sufficient notice to the property-owner to allow him to contest the special benefits he may receive by said improvements, or the just amount of his assessment.

9. The court erred in holding that said notice required by sections 128 and 129 gave the property-holders an opportunity to appear or file objections to the said improvement, and that it
313 *it* was competent for them to raise both the objections that as a district, the costs would be in excess of the exceptional benefits to the property involved, and that as respects individual holders and between themselves, the assessments would not be proportional to the relative benefits to be derived from the improvement, or competent to raise either of said objections.

10. The court erred in holding that under said sections 128, 129 and 130, or any other provisions of said charter, the said common council had an authority to hear and determine both or either of said objections mentioned in the last assignment, and in holding that they had power and authority to stop said improvements, and to change or alter the amount of the assessments of any property, and in not holding that said notice was solely for the purpose of allowing the owners of more than one-half of the property abutting on said improvement to defeat the proposed improvement by a re-

monstrance without any reference to special benefits, or the just amount of their respective assessments.

11. The court erred in holding that the notice required by section 132 of said charter inviting proposals to do the work, and the notice required in section 137 touching the acceptance of the work, and the notice required by section 141 of the entry of the assessments in the docket of city liens, afford, and that either of them afford ample or any opportunity to appear and interpose constitutional objections, and in holding that the property-owner under said notices, or either of them had any right to appear and object that his said assessment was in excess of special benefits, or that it was not a fair or just proportion of the whole cost of said improvement, and in holding that the said council or the board of public works had power and authority to determine any constitutional ob-
314 jection, or power to hear or determine the questions of special benefits or just apportionment of said assessments, or to alter said assessments in any particular when ascertained as provided in said charter.

12. The court erred in holding that the supposed uniformity of the cost of the work in this particular case is any test of the constitutionality of said charter or the said sections thereof.

13. The court erred in holding that the cost of the work in this case was practically uniform throughout.

14. The court erred in holding that the constitutionality of the said charter is the only constitutional question raised here, and in not holding that there was no notice of said assessments given to plaintiffs and that no notice was necessary except the notices mentioned in the foregoing assignments.

15. The court erred in holding that the assessments against these lots were as nearly proportional to benefits as could be devised and in not holding that said assessments were not in any degree proportional to benefits.

16. The court erred in holding that plaintiffs' property was in any degree specially benefited by said improvement.

17. The court erred in holding that there were no substantial costs above benefits.

18. The court erred in holding that the legislature did by said charter ascertain the taxing district in this case, or that it did determine beforehand that said property would be specially benefited, or specially benefited to the amount of said assessments.

19. The court erred in holding that the plan of assessment provided in said charter provides for any ascertainment by either the common council or the legislature of the special benefits, or provides for any apportionment whatever of the whole costs of the improvement.

315 20. The court erred in not holding that the said plan of assessment does arbitrarily fix the amount of said assessments, without reference to any special benefits, and without any apportionment whatever.

21. The court erred in not holding that from the peculiar situation of the property and the character of the improvement as an

elevated roadway, it could not possibly be specially benefited, and in holding from the evidence in the case that general, and not special benefits are sufficient to justify the assessments.

22. The court erred in holding that the long existence of this method of assessment in Portland, has, in effect become a rule of property.

23. The court erred in holding that it was not in conflict with the said fourteenth amendment, as aforesaid, for the common council to ascertain the cost of said improvement and assess the plaintiffs' property therefor, and enter the same upon the city lien docket, not until after the said work was fully completed, and without giving plaintiff- notice of the amount of said assessments before the same were entered in the city lien docket and became liens upon plaintiffs' property.

24. The court erred in holding that it was due process of law and so not in conflict with the said fourteenth amendment for the common council or the legislature not to provide a tribunal with power to hear objections to the amount of plaintiffs' assessment before the assessments, after being made, were entered upon the city lien docket and became liens upon plaintiffs' property.

25. The court erred in holding that the benefits to the property might be estimated upon the assumption that the property might thereafter be built on so as to bring the same up to the grade
316 of the roadway, and in not holding that the benefits must be estimated upon the condition and situation of the property as it was then used by the owners.

26. The court erred in holding that the said determination of the special benefits was not made arbitrarily and without using any discretion.

27. The court erred in dismissing plaintiffs' complaint and in giving judgment against plaintiff- for costs and disbursements.

And by reason of the foregoing errors and holdings, the appellants pray that the said decree may be reversed and a mandate entered that all of said proceedings set forth in the complaint be declared null and void and said pretended liens be canceled and held for naught, and the threatened sale of plaintiffs' property by the said defendant, the chief of police, be perpetually enjoined and for costs and disbursements and such other and further relief as may seem meet and proper and that they may be restored to all things which they have lost by reason of said decree.

MARTIN L. PIPES,
ARTHUR P. TIFFT,
Attorneys for Appellants.

317 [Endorsed:] Original No. — In the supreme court, of the State of Oregon. A. N. King, *et al.*, plaintiffs & app'l'ts *vs.* City of Portland *et al.*, defendants & resp. Assignment of errors. Pipes & Tifft, 708–711 Chamber of Commerce, Portland, Oregon, attorneys for pl'tiffs.

318 In the Supreme Court of the State of Oregon.

A. N. KING, P. J. MANN, A. S. NICHOLS, THE Multnomah Investment Company, a Corporation, and Fred N. Pendleton, Plaintiffs and Appellants, *vs.* THE CITY OF PORTLAND, THE BOARD OF Public Works, The Common Council of said City, D. H. McLaughlin, Chief of Police, and A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works, and W. M. Lind and Joseph M. Manning, Partners Doing Business under the Firm Name of Lind & Manning, Defendants and Respondents.	Order Allowing Writ of Error.

This 13th day of February, 1901, came the plaintiffs and appellants by their attorneys Martin L. Pipes and A. P. Tifft and filed herein and presented to the court their petition, praying for the allowance of a writ of error intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the decree herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the said writ is hereby allowed upon the said appellants giving bond according to law in the sum
319 of five hundred ($500.00) dollars, which shall operate as a supersedeas bond.

R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

[Seal Supreme Court, State of Oregon.]

Attest: J. J. MURPHY,
Clerk Supreme Court of Oregon.

[SEAL OF COURT.]

320 [Endorsed:] No. — In the supreme court of the State of Oregon, A. N. King *et al.* plaintiff- & app'l'ts *vs.* City of Portland *et al.* defendants — respondents Order allowing "writ of error" Pipes & Tifft, 708–711 Chamber of Commerce, Portland, Oregon, attorneys for app'l'ts

321 In the Supreme Court of the United States.

A. N. KING, P. J. MANN, A. S. NICHOLS, THE Multnomah Investment Company, a Corporation, and Fred N. Pendleton, Plaintiffs in Error,
vs.
THE CITY OF PORTLAND, THE BOARD OF PUBLIC Works, The Common Council of said City, D. H. McLaughlan, Chief of Police; A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works, and W. M. Lind and Joseph M. Manning, Partners Doing Business under the Firm Name of Lind & Manning, Defendants in Error. } Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment and decree of a plea which is in the said supreme court of the State of Oregon, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between A. N. King, P. J. Mann, A. S. Nichols, The Multnomah Investment Company, a corporation, and Fred N. Pendleton, plaintiffs and plaintiffs in error, and The City of Portland, The Board of Public Works, The Common Council of said City, D. H. McLaughlan, chief of police, A. N. Gambell, auditor of said city and clerk of the board of public works, and W. M. Lind and Joseph M. Manning, partners under the firm name of Lind & Manning, defendants, and defendants in error, wherein was drawn in question the validity of a statute of, and an authority ex-
322 ercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said A. N. King, P. J. Mann, A. S. Nichols, The Multnomah Investment Company, a corporation, and Fred N. Pendleton, plaintiffs in error, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within sixty days from the date hereof in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 16th day of February, 1901.

[Seal United States Circuit Court, Oregon.]

J. A. SLADEN,
Clerk of the Circuit Court of the United States.

Allowed by—
R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

Attest:

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

323 Copy of the within and foregoing writ of error duly certified to as such by A. P. Tifft, one of attorneys of record of the plaintiffs in error, lodged with me as clerk for the defendants in error, this 16th day of February, 1901.

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

UNITED STATES OF AMERICA, *District of Oregon,* } ss:

Due & legal service of the within writ of error is admitted this 7th day of March, 1901.

J. M. LONG,
City Att'y & Att'y for Defendants in Error.

324 [Endorsed:] Original. In the Supreme Court of the United States. A. N. King, P. J. Mann, A. S. Nichols, The Multnomah Investment Co., a corporation, and Fred N. Pendleton, plaintiffs in error, *vs.* The City of Portland, The Board of Public Works, the Common Council of said City, D. H. McLaughlan, chief of police, A. N. Gambell, auditor of said city and clerk of the board of public works, and W. M. Lind and Joseph M. Manning, partners under the firm name of Lind & Manning, defendants in error. Writ of error. Filed Feb'y 16, 1901. J. J. Murphy, clerk. Martin L. Pipes and A. P. Tifft, attorneys for plaintiffs in error. J. M. Long and R. R. Duniway, attorneys for defendants in error. Pipes & Tifft, attorneys-at-law, 708–711 Chamber of Commerce, Portland, Oregon.

325 In the Supreme Court of the State of Oregon.

A. N. KING ET AL., Appellants,
vs.
THE CITY OF PORTLAND ET AL., Respondents.

I, J. J. Murphy, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript is a full, true, and complete copy of the record of said suit certified to and filed with

our said court as the transcript on appeal from the decree of the circuit court of the State of Oregon for the county of Multnomah, from which the said appeal was taken, and is a copy of the notice of appeal and undertaking and of the abstract of the record upon which said appeal was heard and the decree of our supreme court entered thereon on the 10th day of November, 1900, and the stipulations of the parties agreeing that said abstract be considered and stand for the transcript, and that a printed copy of such abstract may be used by the clerk of this court for his transcript of the record on the writ of error, together with the exhibits and testimony taken in said cause, and the briefs of the respective parties hereto.

I further certify that the foregoing transcript likewise contains a full, true, and correct copy of the decree of our said supreme court upon the said appeal entered on the said 10th day of November, 1900, and a full, true, and correct copy of the opinion of the court filed and upon which said decree was entered.

I further certify that the petition for a writ of error in said cause and the indorsements thereon; the bond thereon and the indorsements thereon; the citation and proof of service indorsed thereon, the assignment of errors, order allowing writ of error, and writ of error, all which are attached to the above and foregoing, are the original petition, bond, citation, assignment of errors, order allowing writ of error, and writ, lodged with and now in my office;

326 and I do further certify that the above and foregoing are such original papers so lodged and filed with me, and that the foregoing transcript is a true and correct copy of the papers and pleadings filed and of the proceedings had in the above-entitled cause in our said court as the same appears of record and on file in my office.

I further certify that the cost of the foregoing return to writ of error is $16.20 and that said amount was paid by Messrs. Pipes & Tifft for the plaintiff- in error.

In witness whereof, I have hereunto set my hand and the seal of the supreme court of the State of Oregon, at my office in the city of Salem, in said State, this the 6th day of April, 1901.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

[Endorsed:] No. —. In the Supreme Court of the United States, —— term, *189–*. A. N. King *et al.* pl'tffs in error *vs.* City of Portland *et al.* defts in error.

Endorsed on cover: File No. 18,136. Oregon supreme court. Term No. 307. A. N. King, P. J. Mann, A. S. Nichols, The Multnomah Investment Company & Fred N. Pendleton, plaintiffs in error, *vs.* The City of Portland, The Board of Public Works, The Common Council of said City *et al.* Filed April 27th, 1901.

MAY 13 1901
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM 1900

A. N. King, P. J. Mann, A. S. Nichols, the Multnomah Investment Company, a corporation, and Fred N. Pendleton,
Plaintiffs in Error.

vs.

The City of Portland, the Board of Public Works, the Common Council of said City, D. M. McLauchlan, Chief of Police, A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works, and M. W. Lind and Joseph M. Manning, partners, doing business under the firm name of Lind & Manning,
Defendants in Error.

PETITION

of Defendants in Error to Advance the Case

JOEL M. LONG,
Of Counsel for Defendants in Error

JOEL M. LONG,
FRED A. MULKEY and R. R. DUNIWAY,
Attorneys for Defendants in Error

SCHWAB BRO'S PRTG. & LITH. CO.

IN THE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM 1900

A. N. King, P. J. Mann, A. S. Nichols, the Multnomah Investment Company, a corporation, and Fred N. Pendleton,

Plaintiffs in Error.

vs.

The City of Portland, the Board of Public Works, the Common Council of said City, D. M. McLauchlan, Chief of Police, A. N. Gambell, Auditor of said City and Clerk of the Board of Public Works, and M. W. Lind and Joseph M. Manning, partners, doing business under the firm name of Lind & Manning,

Defendants in Error.

PETITION

of Defendants in Error to Advance the Case

STATEMENT.

This is a suit to enjoin the collection of certain assessments levied to pay for the improvement of a street in the City of Portland, Oregon.

Plaintiffs in error filed their bill in the Circuit Court of the State of Oregon for Multnomah County, and alleged that the provisions of the act of the Legislature incorporating the City of Portland in respect to improvements and assessments of the cost for making the same upon the property affected, are null and void, as opposed to the provisions of the Fourteenth Amendment to the Constitution of the United States, in this particular, that the method of assessment provided in the said act and in the ordinances passed in pursuance thereof make an assessment depend solely upon the cost of the improvement on half the street in front of the said property, and not upon the question whether the said property is benefited by the same, and that the cost of the whole improvement is not permitted or authorized to be appropriated among or between the owners of the property affected by said improvement, and that each of said lots assessed is by the charter and ordinances made a taxing district. That the proceedings were null and void and constituted an attempt by the city and its officers to take the property of the plaintiffs in error away from them without due process of law, and contrary to the Fourteenth Amendment of the Constitution of the United States of America, prohibiting any person from taking property without due process of law.

The case was put at issue upon the defendants' denial of each allegation of the complaint, and affirmative allegation that the common council took into consideration whether the property was benefited by the said improvement to the amount of benefits, and apportioned the same according

to the benefits the property derived from said improvement, and in all things complied with the city charter.

The plaintiffs in error admit that all the provisions of the charter were complied with.

The case was tried in the circuit court, and the evidence shows that the council found that the property would be benefited to an amount in excess of the cost of the improvement before ordering it to be made, and that as a matter of fact, the improvement benefited the property greatly in excess thereof.

The circuit court found that the council took into consideration the question of benefits, and that the cost of the improvement assessed against the property of the plaintiffs in error did not exceed or equal the benefits that accrued to the property by reason of the improvement, and found generally upon all the issues in the case, and gave a decree for the city and its officers, dismissing the bill.

The defendants in error appealed to the Supreme Court of the State of Oregon, where the case, after full argument, was affirmed by the said Supreme Court, and is cited as King v. Portland, 62 Pacific, p. 2.

The plaintiffs in error rely upon Norwood v. Baker, 172 U. S. 269.

It will be seen by an examination of King v. Portland, 62 Pacific, 2, that the only question considered by the Supreme Court of the State of Oregon was whether Norwood v. Baker applied to our method of assessment, and the Supreme Court of the State held that it was inapplicable. Since the decision of King v. Portland, supra, United States Circuit Court for the District of Oregon, Bellinger, Judge, has held in the case of Ross v. The City of Portland, that Norwood v. Baker does apply. (Decision unreported.) The United States Circuit Court follows the decision of Federal Circuits Courts of other states, and applies the rule of Norwood v. Baker to our street assessments.

The Portland charter provides that whenever an improvement, the expenses of which are to be assessed against the property benefited, has been completed so as to enable the board of public works to determine the cost thereof, the board shall give notice of a time for hearing objections to the assessment, and if the board shall determine that the work has been completed according to contract, it shall approve the same, and that thereupon the auditor shall prepare an assessment covering the entire cost of the work and apportion the same to the property affected within the limits of the street in manner following, viz.:

Each lot or part thereof within the limits of the proposed street improvement abutting upon the street, shall be liable for the full cost of making the same upon half of the street in front of and abutting upon it, and for a proportionate share of the cost of improving intersections, and when this

probable cost has been ascertained or determined and the proportionate share chargeable upon each piece of land, the common council shall declare the same by ordinance. (Laws of Oregon of 1898, pp. 155, 156, 157.)

The provisions of the charter of the City of Portland in reference to street assessments and the manner of laying the same have been in force for the last quarter of a century, and in fact the assessment laws of all the Pacific States are either, as provided in our charter, by the district or by the front foot for street improvements, and until the courts and members of the bar applied the case of Norwood v. Baker, supra, to such charter provisions, had not been questioned.

The depression of 1893, 1894, 1895 and 1896 practically suspended all street improvements, and the late prosperous times have caused a great revival in this line, and all of our western cities are making many street improvements, most of them issuing bonds for payment therefor, and, in fact, practically all the charters in the State of Oregon are modeled after the Portland charter, and as a result of the uncertainty that has arisen in the application of Norwood v. Baker to our local charter, the bonds that must necessarily be issued in order to pay for many of these improvements, and the tendency of contractors to raise their prices, in some instances absolutely refusing to contract for street work, the western cities are greatly and injuriously affected, more so than the result of any condition in the western cities for many years.

We would respectfully call the attention of the Honor-

able Court to the fact that a large amount of money is invested in bonds, warrants, and other municipal securities affected by street improvement assessments, and that the matter has now reached that point where all of our cities are practically at a standstill, and that should we proceed farther, prior to an application of Norwood v. Baker to street assessments for street improvements as applied to our western charters, the doubt thrown upon their validity will cause practically all of them to be litigated

We would respectfully petition this Honorable Court, therefore, and show to the court that this is a matter of great public importance so far as our western cities are concerned, where the necessity for street improvements and public improvements generally is very great, and especially in many cities where the law applies the rule as to sewer assessments the same as it does to street assessments, the health of the inhabitants of our growing western cities is endangered, and our condition as to all classes of public improvements where benefits are to be assessed for the payment of the cost thereof is greatly demoralized.

We respectfully submit herewith petitions from the officers of other cities in support of our statement that it is a matter of general public interest and importance that as early a settlement as possible be made of this question.

We print herewith a copy of the stipulation consenting to the advancement of the case:

STIPULATION.

It is hereby stipulated by and between the attorneys for the respective parties in the above-entitled suit that on account of the public interests that are involved, the above-entitled suit may be advanced and set down for hearing by the Supreme Court of the United States at any date that the court may fix for the same.

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Attorneys for Plaintiffs in Error.

_____

Attorney for Defendants in Error.

Respectfully submitted,

J. M. LONG,

City Attorney for the City of Portland and Attorney for the Defendants in Error.

Portland, Oregon, May 1, 1901.

Supreme Court of the United States

OCTOBER TERM, 1898

No. 317

A. N. KING ET AL., Plaintiffs in Error,

vs.

THE CITY OF PORTLAND ET AL.

PETITION IN SUPPORT OF MOTION TO ADVANCE.

Jos. M. Long,
Counsel for Defendants in Error.

(18,136.)

Jno. A. Dawson, Printer, Washington, D. C. 3-12-98.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 651.

KING ET AL., PLAINTIFFS IN ERROR,

vs.

CITY OF PORTLAND, DEFENDANT IN ERROR.

PETITION FOR ADVANCEMENT.

To the Hon. Chief Justice Fuller and
Associate Justices of the Supreme Court:

The undersigned, mayor of the city of San Francisco, California, and the city attorney thereof, would respectfully petition your honorable court to advance the case of King *et al. vs.* The City of Portland, now pending in the Supreme Court of the United States on writ of error from the supreme court of the State of Oregon, affecting the validity of the law on street assessments.

We would respectfully show to your honorable court that great confusion has arisen on the western coast over the construction given the case of Norwood *vs.* Baker by the United States Federal courts and the construction given to the case by the State courts.

The laws of California and practically all the Pacific Coast States authorize the common council of the cities to assess the entire costs upon lots and lands fronting upon the improvement, or by the front-foot rule. These laws have been quite generally sustained by our courts, and have been in vogue on this coast for a great many years, as not in conflict with *Norwood vs.* Baker, 172 U. S. The Federal courts of Oregon and Washington have held to the contrary. The result of these conflicting decisions has been to create a great uncertainty in the minds of the people, officers of municipal corporations, the court and bar. Therefore it has become a matter of general public importance to have settled at the earliest possible date the application of the Federal question to our assessment laws, and so long as this question remains unsettled the cases from various courts are liable to go to the Supreme Court of the United States. Moreover, street improvements, which are very necessary in growing western cities, will be retarded on account of this uncertainty.

We therefore respectfully pray that on account of the public importance of the case of King *vs.* City of Portland, directly involving the validity of the laws of the State of Oregon authorizing the assessment upon the adjacent property to the full cost of the improvement, it be advanced and heard at as early a date as possible; for which your petitioners will ever pray.

JAS. D. PHELAN,
Mayor of the City and County of San Francisco,
State of California.

FRANKLIN K. LANE,
Attorney for the said City and County of San Francisco.

IN THE UNITED STATES SUPREME COURT.

KING ET AL., *Plaintiffs in Error*,
vs.
THE CITY OF PORTLAND, *Defendant in Error*.

Your petitioners respectfully show unto this honorable court:

1. That your petitioner J. M. Comstock is the duly elected, qualified, and acting mayor of the city of Spokane, and that your petitioner F. M. Dudley is the corporation counsel for said city; that your petitioners are informed that the above-entitled cause presents for decision the right of a municipal corporation to levy assessments upon adjacent property for the full cost of street improvements, and the question of the right of the legislative authority of the municipality to apportion such assessment upon a basis other than that of benefits received.

Between 1893 and 1899 the city of Spokane made extensive street improvements and provided for the payment of the cost thereof by assessments upon abutting property. Such assessments were apportioned upon said property upon an *ad valorem* basis. Since the decision by this honorable court in the case of Norwood *vs.* Baker (172 U. S., 269), rendered December 12, 1898, serious doubts have existed as to the constitutionality of these levies, and in consequence great difficulty has been experienced in collecting assessments. There are now outstanding and unpaid of these assessments over $150,000.

Your petitioners believe that the decision of this honorable court in the above-entitled cause will dispose of many,

if not all, of the controversies arising upon the assessments heretofore levied by the city of Spokane, and your petitioners would respectfully pray that the above-entitled cause may be advanced upon the docket, so that an early determination thereof may be had.

And your petitioners will ever pray.

J. M. COMSTOCK,
Mayor of the City of Spokane.

F. M. DUDLEY,
Corporation Counsel of the City of Spokane.

DENVER, COLORADO, *May 1st*, 1901.

To the Honorable Judges of the Supreme Court
of the United States, Washington, D. C.

HONORABLE SIRS: I respectfully petition your honorable court for the advancement of the case of King *et al. vs.* The City of Portland. This case involves a construction of the case of Norwood *vs.* Baker, 172 U. S., which case has caused a great deal of trouble and discussion in the various cities of this country since it was decided. There is a vast amount of litigation in this State involving the validity of assessments for local improvements, which assessments are made under very similar provisions to the charter of the city of Portland, and a decision in the case of King *et al. vs.* City of Portland will go a long way towards clearing up the confusion in these matters, and especially as to the right interpretation of Norwood *vs.* Baker.

H. M. ORAHOOD,
City Attorney.

RR.

DENVER, COLORADO, *May* 1, 1901.

To the Honorable Judges of the Supreme Court of the United States, Washington, D. C.

HONORABLE SIRS: I respectfully petition your honorable court for the advancement of the case of King *et al. vs.* The City of Portland. This case involves a construction of the case of Norwood *vs.* Baker, 172 U. S., which case has caused a great deal of trouble and discussion in the various cities of this country since it was decided. There is a vast amount of litigation in this State involving the validity of assessments for local improvements, which assessments are made under very similar provisions to the charter of the city of Portland, and a decision in the case of King *et al. vs.* City of Portland will go a long way towards clearing up the confusion in these matters, and especially as to the right interpretation of Norwood *vs.* Baker.

R. R. WRIGHT, JR., *Mayor.*

H.

SALT LAKE CITY, UTAH, *May 8th*, 1901.

The Honorable Supreme Court of the United States:

On account of the fact that an early determination of the issues involved in the case of King *vs.* The City of Portland is of great importance to all municipalities, I respectfully ask, in behalf of Salt Lake City, that said case be advanced upon the docket as requested by Hon. J. M. Long, city attorney of the city of Portland.

Respectfully submitted.

FRANK B. STEPHENS,
City Attorney, Salt Lake City.